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TRANSCRIPT OF RECORD

537028

Supreme Court of the United States

OCTOBER TERM, 1942

No. 245

ZIFFRIN, INCORPORATED, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

FILED JULY 30, 1942.

SUPREME COURT OF THE UNITED STATES

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vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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[fol. 1] [Caption omitted]

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

Civil Action. No. 448

Equitable Relief Sought

ZIFFRIN, INCORPORATED, a Corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT AND PETITION FOR INJUNCTION—Filed October 21, 1941

Comes now Ziffrin, Incorporated, petitioner, and for its cause of action alleges and says:

1. Your petitioner, Ziffrin, Incorporated, is a corporation organized on the 20th day of March, 1933 under and by virtue of the laws of the State of Indiana, with its principal office and place of business at 1120 Division Street, Indianapolis, Marion County, Indiana.

2. Your petitioner is engaged in the business of transporting property in interstate and foreign commerce as a motor vehicle contract carrier of certain commodities, the principal commodities, but not all such commodities, are: alcoholic liquors and beverages, empty bottles and other materials and supplies used by distilleries and breweries, canned and preserved food products, packing-house products and meats, condensed and evaporated milk, dairy products including oleomargarine, electric refrigerators, appliances, motors and parts, shade cloth and fixtures, batteries, cheese and its by-products, iron and steel articles, and paper products and paper articles, from various points of origin [fol. 3] over irregular routes to various points and places in the following described territory, to-wit:

The State of Indiana, the State of Ohio, the State of Illinois, and the following specific points of Louisville, Kentucky and St. Louis, Missouri.

Your petitioner further represents and shows that the principal points of origin, but not all of the points of origin, for the commodities transported by it in interstate and foreign commerce to various points and places in territory as aforesaid are as follows:

Indianapolis, Indiana, Chicago, Illinois, Lawrenceburg, Indiana, Louisville, Kentucky, and Cincinnati, Ohio.

3. Your petitioner has been engaged in the transportation, under contract of various commodities from the principal points of origin, as aforesaid, and from other points of origin to points and places generally in the destination territory, all as aforesaid, on, before and continuously since July 1, 1935.

4. Your petitioner, in conducting its business operates 175 pieces of motor vehicle equipment, all of which fully comply with State and Federal safety requirements, and maintains offices and garages, or both, at the following points within its territory, to-wit:

Indianapolis, Indiana, Lawrenceburg, Indiana, Chicago, Illinois, Louisville, Kentucky, and Cincinnati, Ohio.

5. Your petitioner does a gross business of more than $450,000.00 per year, furnishes employment to 130 employees with an annual payroll of $150,000.00, and the value of its business is estimated at $750,000.00.

6. Your petitioner complied with the N. R. A. Code for the trucking industry and has been continuously engaged [fol. 4] as a motor vehicle contract carrier since 1933, and all of the transportation provided by it was and is under special and individual contracts and agreements with certain specific shippers, copies of all of which contracts are all on file in the offices of the defendant, Interstate Commerce Commission, in accordance with rules and regulations promulgated by said Interstate Commerce Commission. Your petitioner has complied with all provisions of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, and all rules and regulations affecting contract carriers by motor vehicles engaged in interstate and foreign commerce promulgated by the Interstate Commerce Commission pursuant to the provisions of said act.

7. This action arises under the Fifth Amendment to the Constitution of the United States, and under the laws of the United States, and more particularly under Section 205 (h) of the Motor Carrier Act of 1935, now Section 205 (g) of Part II of the Interstate Commerce Act (U. S. Code, Sup. 1, Title 49, Sec. 305 (h)), and under the Acts of Congress, Code of Laws of the United States, Title 28, Sections 41 (28), 32 to 48, inclusive, and the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars. Petitioner sues to enjoin, set aside, annul and restrain the enforcement of a certain order of the Interstate Commerce Commission being order No. MC-2511, Ziffrin, Incorporated, Contract Carrier Application, approved on the 29th day of May, 1941 by Division 5 of the Interstate Commerce Commission, a true copy of which order as served on counsel for petitioner, marked Exhibit "A" is attached to this petition and complaint and is hereby made a part hereof by reference.

[fol. 5] 8. By an application filed on February 4, 1936 under the provisions of Section 209 of the Motor Carrier Act, now Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 309), as later amended, your petitioner sought a permit as a contract carrier authorizing it to continue the transportation by motor vehicle in interstate and foreign commerce of commodities generally to and from the points and places all as aforesaid.

9. Following the filing of said application by your petitioner, as hereinbefore set out, said application was received and docketed by the Interstate Commerce Commission under No. MC-2511, and thereafter said Interstate Commerce Commission referred said application to W. L. Snodgrass, a district supervisor of said Interstate Commerce Commission stationed at Indianapolis, Indiana, and having offices in the United States Courthouse and Federal Building at Indianapolis, Indiana, for investigation to determine whether or not your petitioner had been in bona fide operation in the territory over irregular routes and transporting the commodities set out in said application on July 1, 1935 and continuously thereafter, as required by the provisions of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act. Representatives of your petitioner, at the request of said W. L. Snodgrass, district supervisor of said Interstate Commerce Commission, conferred with

him relative to the nature of the operations of your petitioner on, before and continuously since July 1, 1935, and furnished said W. L. Snodgrass for his inspection and examination the original records of your petitioner showing [fol. 6] the transportation of large numbers of shipments of the commodities as aforesaid in the territory as aforesaid on, before and continuously since July 1, 1935.

10. Your petitioner, by its authorized representatives, entered into an arrangement and agreement with said Snodgrass, by which your petitioner agreed to accept a permit as a contract carrier authorizing it to continue the transportation of a part but not all of the commodities claimed in said application as originally filed, and the transportation in a part but not all of the territory included in said original application, as aforesaid, and your petitioner by its authorized representatives, signed said agreement in writing, a copy of which is marked Exhibit "B", attached hereto and made a part hereof by reference.

11. On March 12, 1938 said Interstate Commerce Commission issued what is commonly referred to as a compliance order in docket number MC-2511 approving and embodying therein the provisions of the agreement by and between said Snodgrass and the authorized representatives of your petitioner, and authorizing your petitioner to continue in operation as a contract carrier of certain specified commodities in certain specified territory, and directing that all other parts of the original application should be denied. A copy of said order marked Exhibit "C" is attached hereto and made a part hereof by reference.

12. Your petitioner immediately upon receiving a copy of said compliance order of March 12, 1938 took steps to comply with the provisions of said order and did comply with the provisions of said order, and limited its operations to those specifically authorized by said compliance order and discontinued transportation of certain commodities and withdrew its service from all territory except that territory [fol. 7] specifically authorized by said compliance order, and accepted said order as being a final determination of its operating rights.

13. On June 4, 1938 without any notice to or hearing of your petitioner said Interstate Commerce Commission entered an order vacating and setting aside said compliance

order of March 12, 1938. A copy of said order is marked Exhibit "E", attached hereto and made a part hereof by reference.

14. Thereafter and after said Interstate Commerce Commission had set aside said compliance order without any notice to your petitioner, said Snodgrass, district supervisor of said Interstate Commerce Commission, made an affidavit stating that your petitioner was entitled to a permit as a contract carrier authorizing your petitioner to continue the transportation of the commodities and in the territory as set out in said compliance order. A copy of said affidavit is marked Exhibit "D", attached hereto and made a part hereof by reference.

15. On June 23, 1938 said Interstate Commerce Commission made an order setting for hearing said application of your petitioner, said hearing to be held July 19, 1938 at Indianapolis, Indiana, and directing that your petitioner, in addition to presenting evidence in support of the allegations and claims of said application relative to operating rights, should make a showing as follows:

"Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC 2510) and if said applicant and the Ziffrin Truck Lines, Inc. are found to be affiliated within the meaning of Section 5 (6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Sec-
[fol. 8] tion 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act, 1935."

A copy of said order is marked Exhibit "F", attached hereto and made a part hereof by reference.

16. Following said order of June 23, 1938 said Interstate Commerce Commission issued notices changing the date of said hearing from July 19, 1938 to August 10, 1938, and later to September 12, 1938, said notices merely changing the date of said hearing and not changing or modifying in any particular the provisions or requirements of said order of June 23, 1938.

17. Hearing on said application pursuant to the provisions of said order of June 23, 1938 was held before Examiner H. C. Lawton, representing said Interstate Commerce Commission, at Indianapolis, Indiana on September 12th and September 13, 1938. At the outset of said hearing your petitioner objected to any hearing for consideration of the matters set out in said order of said Interstate Commerce Commission of June 23, 1938 relating to the alleged corporate relationship between your petitioner and Ziffrin Truck Lines, Inc. for the reason that said order of June 23, 1938 of said Interstate Commerce Commission purported to require your petitioner to make certain showings under provisions of Section 5 (6) of Part I of the Interstate Commerce Act, which at the time of the issuance of said order was not applicable to contract or common motor vehicle carriers, and for the further reason that said section, although later made applicable to motor carriers by amendment of the act, relates solely to proposed consolidations or mergers, and that no part of said section applies to your petitioner or its alleged relationship with said Ziffrin Truck Lines, Inc.

[fol. 9] 18. Said objections of your petitioner were overruled by said examiner and said hearing proceeded on September 12, 1938 on the issues raised by said order of said Interstate Commerce Commission of June 23, 1938, involving not only the operating rights of your petitioner under Section 209 of the Motor Carrier Act, now Part II of the Interstate Commerce Act, but also requiring your petitioner to make certain showings under provisions of Part I of the Interstate Commerce Act which were not applicable to your petitioner.

19. At the time of said hearing your petitioner amended its application limiting considerably the territory claimed in the original application. Following said hearing pursuant to the instruction of said examiner, your petitioner prepared and filed with said Interstate Commerce Commission a listing of certain original records relating to transportation performed by it, said exhibit being submitted to and examined by representatives of protestants appearing at said hearing before said exhibit was filed with said Interstate Commerce Commission. Following said hearing briefs were filed by applicant and certain other parties who appeared at said hearing.

20. On March 18, 1939 the examiner filed a recommended report and order submitting his recommendations for the disposition of said application, which recommendations granted in part and denied in part the application, as amended, and further conditioned the granting of a contract carrier permit to your petitioner upon the surrender by Ziffrin Truck Lines, Inc., a common carrier by motor vehicle engaged in the transportation of commodities generally over certain specific routes, of certain operating rights theretofore granted to said Ziffrin Truck Lines, Inc. [fol. 10] by said Interstate Commerce Commission in proceedings separate and distinct from the proceedings relative to your petitioner. Said Ziffrin Truck Lines, Inc. was not made a party to the proceedings by said order of June 23, 1938, received no notice of the proceedings therein ordered by said Interstate Commerce Commission in its order of June 23, 1938, and did not appear or participate in the hearing held by said Interstate Commerce Commission on the application of your petitioner pursuant to said order on September 12th and 13, 1938.

21. Your petitioner seasonably filed exceptions to said recommended report and order as provided by law and by the rules and regulations of said Interstate Commerce Commission, and your petitioner also requested an opportunity to present oral argument in support of said exceptions, which request was granted by said Interstate Commerce Commission.

22. On October 27, 1939 oral argument was held before Division 5 of said Interstate Commerce Commission at the offices of said Interstate Commerce Commission at Washington, D. C. at which oral argument your petitioner appeared and was represented by counsel and certain other parties appeared and were represented by counsel.

23. On May 29, 1941 Division 5 of said Interstate Commerce Commission entered an order finding that your petitioner had certain operating rights by reason of bona fide operations conducted on, before and continuously since July 1, 1935, but denying said application, as amended, in toto by reason of an alleged relationship between your petitioner [fol. 11] and said Ziffrin Truck Lines, Inc. and ordering your petitioner to cease all operations whatsoever on July 15, 1941. A copy of said order is marked Exhibit "A", attached hereto and made a part hereof by reference.

24. On or about June 25, 1941 your petitioner seasonably filed, as provided by law and by the rules and regulations of said Interstate Commerce Commission, its petition for reconsideration, reargument and/or rehearing, and also its petition for the postponement of the effective date of said order of May 29, 1941, said effective date being July 15, 1941.

25. On July 2, 1941 said Interstate Commerce Commission entered an order extending the effective date of said order of May 29, 1941 from July 15, 1941 to October 15, 1941.

26. On September 27, 1941 said Interstate Commerce Commission entered an order further extending the effective date of said order of May 29, 1941 from October 15, 1941 to November 5, 1941.

27. On September 29, 1941 said Interstate Commerce Commission entered an order denying the petition of your petitioner for reconsideration, reargument and rehearing of the order of May 29, 1941. A copy of said order is marked Exhibit "G", attached hereto and made a part hereof by reference.

28. The effect of the order of said Interstate Commerce Commission of May 29, 1941 and said order of the Interstate Commerce Commission of September 29, 1941 is to compel your petitioner to cease on November 5, 1941 all of its operations in interstate and foreign commerce of every kind and character whatever, all of which have been continuously carried on since 1933, and to deprive your peti- [fol. 12] tioner of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States. The further effect of said orders of said Interstate Commerce Commission is to destroy a business of the value of $750,000.00, to throw 130 employees of your petitioner completely out of work, and to deprive important shippers and receivers of freight of essential transportation facilities which were in existence long prior to the enactment of the Motor Carrier Act of 1935, and which have been carried on continuously without interruption since 1933. The further effect of said orders of said Interstate Commerce Commission is to deprive your petitioner of the right to carry out its contractual obligations with its shippers as contained in the written contracts now

on file with said Interstate Commerce Commission. The further effect of said orders of said Interstate Commerce Commission is to render valueless the investment of all stockholders of your petitioner in the stock of your petitioner, and to render valueless the investment of certain stockholders of your petitioner who are not stockholders in Ziffrin Truck Lines, Inc., and who are not in any way connected with said Ziffrin Truck Lines, Inc.

29. In said order of May 29, 1941 said Interstate Commerce Commission found that your petitioner had certain operating rights under the provisions of Section 209 of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, but said operating rights as found in said order were less than those included in said compliance order of March 12, 1938 which was agreed to by and between [fol. 13] representatives of your petitioner and said W. L. Snodgrass, district supervisor of said Interstate Commerce Commission, all as aforesaid, and which operating rights were less than those conclusively proved by your petitioner in the evidence submitted to said Interstate Commerce Commission at the hearing held September 12th and 13, 1938, and said findings of said Interstate Commerce Commission limiting the operating rights of your petitioner are arbitrary, capricious and contrary to the evidence.

30. In said order of May 29, 1941 said Interstate Commerce Commission, although having previously found that your petitioner had certain operating rights by reason of the fact that it had been engaged in the bona fide transportation of certain commodities in certain territory on, before and continuously since July 1, 1935, nevertheless, denied in toto said application of your petitioner, as amended, which application sought authority to continue those operations in which your petitioner was engaged on, before and continuously since July 1, 1935, on account of an alleged relationship between your petitioner and Ziffrin Truck Lines, Inc., which alleged relationship said Interstate Commerce Commission erroneously found to be in conflict with the provisions of Section 210 of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, as amended, said denial of said application of your petitioner is contrary to law and contrary to the evidence before said Commission. At the time of making the finding that the continued operation of your petitioner as

a contract carrier and said Ziffrin Truck Lines, Inc., as a common carrier, would not be under Section 210 of the Act consistent with the public interest and with the national [fol. 14] transportation policy of the Act, said Interstate Commerce Commission had before it certified copies of orders of various state Commissions showing that your petitioner has for many years and prior to the enactment of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act been recognized as a contract carrier by motor vehicle and permitted to operate as such contract carrier by various states in which its operations are conducted, including the States of Indiana, Ohio and Kentucky, and at the same time for many years and prior to the enactment of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, said Ziffrin Truck Lines, Inc. has been recognized as a common carrier by motor vehicle and permitted to operate as such by the states in which its operations are conducted, including the States of Indiana, Ohio and Kentucky.

31. Said Interstate Commerce Commission in making said finding relative to the alleged relationship of your petitioner and said Ziffrin Truck Lines, Inc. arbitrarily and capriciously ignored and disregarded uncontradicted evidence of record before said Commission, and made such findings and orders contrary to uncontroverted evidence in the record. Said order was made following a hearing for which no notice was given to said Ziffrin Truck Lines, Inc., and in which said Ziffrin Truck Lines, Inc. did not appear and did not participate, and pursuant to the provisions of the order of June 23, 1938 which purported to require your petitioner to make certain showings under provisions of Part I of the Interstate Commerce Act not applicable to your petitioner.

[fol. 15] 32. Said Interstate Commerce Commission in said order of May 29, 1941 in finding that your petitioner and Ziffrin Truck Lines, Inc. are affiliated corporations and under common control and management based said findings and order upon a wholly and totally erroneous statement of the uncontroverted evidence of record relative to the ownership of the stock of your petitioner, and although your petitioner in its petition for reconsideration, dated June 25, 1941, specifically called said erroneous statements relative to the ownership of the stock of your petitioner to

the attention of said Commission and cited the official transcript relative to the evidence relating to said ownership of said stock, nevertheless, said Interstate Commerce Commission arbitrarily and capriciously failed and refused to change or correct said erroneous statements, and said order of said Interstate Commerce Commission dated May 29, 1941 was then and is now based upon totally and wholly erroneous statements of uncontroverted evidence relative to the ownership of the stock of your petitioner. Said Interstate Commerce Commission made said erroneous finding relative to the stockownership in spite of the fact that the correct stockownership was called to the attention of said Interstate Commerce Commission by counsel for your petitioner in oral argument held October 27, 1939.

33. Said Interstate Commerce Commission in said order of May 29, 1941, after finding that your petitioner and said Ziffrin Truck Lines, Inc. are affiliated corporations and under common control and management and are, therefore, subject to the provisions of Section 210 of the Motor Car- [fol. 16] rier Act of 1935, now Part II of the Interstate Commerce Act, arbitrarily, capriciously and in total disregard of the evidence, made a further finding that the holding of a contract carrier permit by your petitioner and a common carrier certificate by said Ziffrin Truck Lines, Inc. would not be consistent with the public interest and with the national transportation policy, when the uncontroverted evidence of record proved conclusively that the operations of both your petitioner as a contract carrier and said Ziffrin Truck Lines, Inc. as a common carrier are consistent with the public interest and with the national transportation policy. Said finding of said Interstate Commerce Commission was made without any evidence whatsoever that the continued operation of your petitioner as a contract carrier and said Ziffrin Truck Lines, Inc. as a common carrier in the manner in which they have operated long before and continuously since the enactment of the Motor Carrier Act of 1935 would in any manner whatsoever be detrimental to the public interest or contrary to the national transportation policy.

34. Your petitioner has exhausted all of its remedies before said Interstate Commerce Commission as provided by law and as provided by the rules and regulations of said Commission.

35. Said defendants, their law enforcement officers, servants, agents and employees are threatening to and will inflict upon your petitioner great penalties unless your petitioner ceases all its operations on November 5, 1941 in accordance with the terms of said orders of defendant, Inter-
[fol. 17] state Commerce Commission, and unless the enforcement of said orders is restrained and enjoined the plaintiff will be compelled to defend a multiplicity of actions seeking to enforce the terms of said orders by inflicting penalties for the violation thereof.

36. Your petitioner, by reason of the provisions of said orders of said Interstate Commerce Commission providing that all of its operations in interstate and foreign commerce must cease on November 5, 1941, will suffer irreparable loss, damage and injury if compelled to discontinue said operations pursuant to the provisions of said orders, and said irreparable loss, damage and injury will begin on November 5, 1941 and continue thereafter during the pendency and consideration of this petition and complaint by this court, unless defendants and their law enforcement officers, servants, agents and employees are restrained and enjoined from taking any steps to enforce the provisions of said orders pending the final determination of this cause.

Wherefore, your petitioner prays:

1. That the Court will issue a temporary restraining order restraining the United States of America and the Interstate Commerce Commission and their law enforcement officers, agents, servants and employees, from enforcing the terms of the order of the Interstate Commerce Commission approved May 29, 1941 marked Exhibit "A" and attached hereto, and interferring with the operations by your petitioner which it has conducted continuously since prior to July 1, 1935.

2. That the Court as soon as practicable after the filing of this petition shall call to its assistance in the hearing and [fol. 18] determination thereof two other judges, one of whom shall be a circuit judge.

3. That process issue against the United States of America and the Interstate Commerce Commission as provided by law.

4. That a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending until the further order of this court the operation, execution, effect, and enforcement of said order of said Interstate Commerce Commission approved May 29, 1941 marked Exhibit "A" attached hereto and made a part hereof.

5. That upon its final hearing this Court shall adjudge such order of the Interstate Commerce Commission to be null and void and set aside, suspend and annul the same and its enforcement, and that the United States of America and the Interstate Commerce Commission, their law enforcement officers, agents, servants and employees be perpetually restrained from taking any steps or instituting or further presenting any proceedings to enforce said order.

6. For such other and further relief as petitioner may be entitled to in the premises, and your petitioner will forever pray.

Ziffrin, Incorporated, by S. Ziffrin, President, Petitioner. Howell Ellis, John S. Powell, Attorneys for Petitioner.

[fol. 19] *Duly sworn to by S. Ziffrin. Jurat omitted in printing.*

[fol. 20] EXHIBIT "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-2511

Ziffrin Incorporated Contract Carrier Application

Submitted October 27, 1939. Decided May 29, 1941

Applicant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle, found to be owned, controlled and managed in a common interest, and that operation by applicant as a contract carrier by motor vehicle over irregular routes, in the transportation of alcoholic liquors, empty containers, labels and other liquor distillery supplies, oleomargarine, canned and preserved food products, packinghouse products and meats, and waste paperboard, between certain points in Indiana, Ohio, Illinois, and Kentucky,

would be inconsistent with the public interest and the national transportation policy of the Interstate Commerce Act. Permit denied.

Howell Ellis and *L. C. Loughry* for applicant.

O. R. Livinghouse, David Axelrod, Jack Goodman, F. D. Norvell, B. W. LaTourette, R. W. Brunow, and *W. K. Thomas* for protestants.

Edward Gusky, M. F. Chandler, Frank H. Luther, P. E. Perry, F. F. Gilbert, and *Floyd F. Shields* for interveners.

Report of the Commission

Division 5, Commissioners Lee, Rogers, and Alldredge

By Division 5:

Applicant and protestants filed exceptions to the order recommended by the examiner, and the parties have been heard in oral argument. Our conclusions differ somewhat from those recommended.

By application [1] filed February 4, 1936, as amended, Ziffrin, Incorporated, of Indianapolis, Ind., seeks a permit authorizing continuance of operations as a contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, from Indianapolis, Terre Haute, Shelbyville, Hammond, and Lawrenceburg, Ind., to points and places in Indiana, Ohio, Kentucky, Illinois, western Iowa, [fol. 21] southeastern Wisconsin, West Virginia, Buffalo, N. Y., Pittsburgh, Pa., and St. Louis, Mo., over irregular routes.

An order, entered March 12, 1938, approved the issuance of a permit to applicant, upon its complying with the pertinent provisions of the act and our rules and regulations thereunder, authorizing transportation, over irregular routes, of the commodities, between the points shown in the margin.[2] Subsequent thereto, upon protests by motor car-

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[1] Under the "grandfather" clause of section 209(a) of the Interstate Commerce Act.

[2] (a) Whiskey; (1) from Lawrenceburg, Ind., to St. Louis, Mo., Louisville, Ky., and points and places in Indiana, Illinois and Ohio; (2) from Cincinnati, Ohio to Chicago, Ill. and Lawrenceburg and Indianapolis, Ind.; (3) from Louisville to Indianapolis; (4) from Terre Haute, Ind., to Louis-

riers operating in the same general territory, the order was stayed and the proceeding referred to an examiner for hearing. At the hearing the application was opposed by rail carriers, the Common Carrier Division of the American Trucking Associations, Incorporated, and numerous motor carriers operating in the territory sought, and supported by a number of liquor distilling companies, the Kraft-Phoenix Cheese Corporation, and Swift & Company. Keeshin Motor Express Co., Inc., Keeshin Motor Express, Incorporated, and Dickens Motor Freight, Inc., intervened subsequent to the hearing.

The order of hearing herein also placed in issue the question of the relations between applicant and Ziffrin Truck Lines, Incorporated; whether the two carriers were affiliated under a common control or management, and, if so [fol. 22] affiliated, whether under section 210 of the Interstate Commerce Act a permit could be held by applicant herein. The other corporation named is a motor common carrier with headquarters at Indianapolis and will hereinafter be referred to as the common carrier company. It has been granted a certificate as a common carrier of general commodities, with certain exceptions, over the routes and between the points described in the appendix hereto, in *Ziffrin Truck Lines, Inc. Common Carrier Application*, 6 M. C. C. 722.

The issues under consideration herein, and discussed in that order, are: (a) the scope of applicant's operations, (b) its status as a common or contract carrier, (c) its affiliation with the common carrier property, and (d) the applicability of section 210 of the act.

Scope of Applicant's Operations—The application, although originally seeking authority to transport gen-

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ville and Lawrenceburg; and (5) from Peoria, Ill., to Cincinnati, Ohio, Indianapolis and Lawrenceburg; (b) distillery supplies, including bottles and labels, from Indianapolis, Terre Haute, and Winchester, Ind., Chicago and Alton, Ill., to Lawrenceburg, Cincinnati and Louisville; (c) canned and preserved food products from Indianapolis, Martinsville, Tipton, and Greenwood, Ind., to Louisville, Cincinnati, Chicago, and Peoria; (d) paper and paper products from Indianapolis, Ind., to Chicago and Louisville; and (e) packing-house products from Chicago to Anderson, Indianapolis, Muncie, Elwood, Tipton, and Franklin, Ind.

eral commodities within a considerable area, contained this statement: "This operation is pretty much whiskey and paper and is dependent upon the output of distilleries and routing orders and is usually carried in truckload lots." At the hearing the application was amended to seek authority embracing the commodities and the territory described in the margin.[3] Louisville, Ky., is within the scope of the destination territory described in the application as filed. It was included as a point of origin in the order of March 12, 1938, and in the amendment [fol. 23] offered at the hearing, and the application will be deemed amended to include it as an origin point.

Applicant's president and general manager, Mr. Sam Ziffrin, is president of the common carrier company, which operates over regular routes in the same general territory as that included in the instant application and to most of the principal points involved therein. In 1933 applicant's president, as an individual, operated under the name of Ziffrin Truck Lines, and engaged in the common carriage of property as the predecessor of the present common carrier company. At the suggestion of certain shippers, the applicant company was organized and incorporated in Indiana in March 1933, in order to secure routes in Indiana which the regulatory body of that State would not grant to Mr. Ziffrin as an individual. The applicant company was organized and incorporated principally in order to engage in the transportation of alcoholic liquors and malt beverages in anticipation of the repeal of the 18th Amendment to the Constitution. The permit originally granted applicant by Indiana, authorizing transportation within that State over irregular routes, did not, however, limit it to the transportation of those commodities. A certificate

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[3] Canned, preserved, and prepared foods, packing-house products, and fresh meats, alcoholic liquors, malt liquors, and distillery supplies, including bottles, milk, condensed and evaporated, dairy products, including oleomargarine, and cheese, paper products and paper articles, shoe polish and dressing, batteries, and steel and iron articles between points and places in that portion of the State of Kentucky within a radius of 150 miles of Louisville; all of Indiana, Ohio, and Illinois; St. Louis, Mo., Pittsburgh, and Schenley, Pa., and Milwaukee, Wis., and points in Wisconsin intermediate to Milwaukee and Chicago, Ill.

granted applicant by Ohio on June 28, 1935, authorized transportation in interstate commerce over numerous routes in that State, but was unrestricted as to commodities. In 1935 applicant was granted authority by Kentucky to operate therein as a contract carrier, but this authority was subsequently revoked. Applicant was also registered under a code of fair competition.

Applicant engaged in the transportation of beer as soon as the manufacture thereof was legalized. The documentary evidence, which will be hereinafter considered in more detail, shows that in April, May, and June 1933, appli- [fol. 24] cant transported a number of shipments of beer and empty containers between Milwaukee, Wis., and Chicago, on the one hand, and various points in Indiana on the other. There is, however, no such evidence pertaining to the transportation of beer or other malt liquors or beverages by applicant later than 1933.

The transportation of alcoholic liquors by applicant was inaugurated at the request of some of the leading distilleries because of the danger of hijacking which attended the transportation of liquor by motor vehicle in the early days of repeal. Applicant provided a system of policing and convoying of liquor transported in its vehicles, which has since been continued.

Applicant's president testified to transportation of the commodities set out in marginal note 3 to numerous points throughout the territory claimed, and to the transportation of alcoholic liquors to certain specific points. Representatives of certain shippers testified in support of the application.

The general traffic manager of the Frankfort Distilleries, Incorporated, who is also an official in the Kentucky Liquor Producers Association, composed of 26 distilling companies, testified to the use of applicant's service by his company under agreements or contracts, entered into between the witness and applicant's president, since prior to July 1, 1935, for the transportation of alcoholic liquors from Louisville to points throughout the territory claimed by applicant, and especially to Chicago, Rockford, Springfield, Pontiac, Decatur, and Metropolis in Illinois, and Indianapolis, Fort Wayne, and Indiana Harbor, Ind., Cincinnati, Ohio, and Milwaukee. The witness specified the weights of some of the shipments claimed to have been transported by applicant

[fol. 25] prior to July 1, 1935, but was unable to name the dates on which such shipments moved, or to state whether they moved in applicant's vehicles, or in those of the common carrier company, although the bills of lading under which the shipments moved were prepared by the shipper. The agreements under which applicant performed transportation for this company were verbal, at least prior to July 1, 1935, were sometimes negotiated in respect of single loads, were modified from time to time with respect to the rates to be charged, and were never in effect for any definite period.

Joseph Seagrams and Sons, Inc., and subsidiary distilling companies operate distilleries, and bottling and rectifying plants at Louisville and Lawrenceburg. Within the territory under consideration herein it ships alcoholic liquors to Pittsburgh and New Castle, Pa., and to Canton, Columbus, Cleveland, Cincinnati, and Toledo, Ohio. Its distribution in Indiana, Illinois, Wisconsin, and Kentucky is said to be more general in character. Its traffic manager testified that applicant transported shipments of liquor to points in the territory claimed by applicant from Louisville and Lawrenceburg only, and handled some return shipments to those origins. The Louisville plant did not begin operations until some time in 1936 and the witness conceded that prior thereto applicant may not have served his company from that origin. He thought, however, that applicant had transported liquor to Louisville from Lawrenceburg for the company. Some of the bills of lading in the possession of the company bore the name of either Ziffrin Truck Lines or the common carrier company, and the witness had no definite knowledge as to how applicant's president may have handled the traffic.

The Schenley Distilleries, Inc., owns and controls some 13 distilleries located at Lawrenceburg, and at Louisville, [fol. 26] Covington, Frankfort and Lexington, Ky. All except two distilleries at Louisville and one at Lexington have been owned by Schenley since 1933 and these three have been operated by the corporation since 1937. A representative of Schenley testified to the use of applicant's service in the territory claimed prior to and since July 1, 1935, in the transportation of liquor from the distilleries and supplies to the distilling points. The supplies consisted principally of glass bottles from Alton, Ill., Dunkirk, Indian-

apolis, Terre Haute, and Winchester, Ind., and glue from Chicago.

This witness named St. Louis, Louisville, Canton, Cleveland, Toledo, and Columbus, Ohio, some 15 points throughout Indiana, and some 43 destinations in Illinois as having been served by applicant for the Schenley Distilleries. He was unable, however, to specify which of the numerous points were served by applicant for the Schenley Distilleries prior to July 1, 1935, and which ones were served subsequent to that date. The destinations were named in an exhibit which the witness conceded had been prepared from records in applicant's office. There was no written contract between Schenley and applicant until some time in 1936. Although Schenley utilized applicant's service on truckload shipments and that of the common carrier company on less-than-truckload shipments, when applicant occasionally transported 5,000 pound shipments and the common carrier company transported truckload shipments from Louisville and Lawrenceburg for this shipper. At the time of the hearing herein the common carrier company was transporting for Schenley from Frankfort, Ky., due to the fact that applicant was not authorized to operate in Kentucky.

A representative of Swift & Company of Chicago, Ill., and its subsidiaries, testified to having used applicant's service for the transportation of meats and packing-house products, [fol. 27] on and prior to the statutory date in the territory under consideration, and particularly to Louisville, Cincinnati, Harrington, Middletown, Dayton, Piqua, Sidney, and Greenville, Ohio, and Richmond, Connersville, Greenfield, Anderson, Muncie, and Indianapolis, Ind. The transportation was performed under a form of agreement relating principally to insurance requirements which the company required common as well as contract carriers to enter into. The charges for the transportation were embodied in separate agreements. The company utilized common carrier service where the rates were lower than the charges of contract carriers, and employed both applicant and the common carrier company. The latter, since 1938, has supplanted applicant in serving three points in Indiana.

The general traffic manager of the Kraft-Phoenix Cheese Company testified to having employed applicant under a verbal contract on, prior, and subsequent to July 1, 1935, in the transportation of cheese, salad dressing, and related commodities between all points in the territory claimed.

Applicant served the company principally in the transportation of truckload shipments to the larger cities, such as Chicago, Louisville, Indianapolis, and St. Louis and, according to the witness, possibly to a few points intermediate to these cities. The common carrier company transported less-than-truckload shipments for this company. The witness was unable to specify any particular shipments or dates on which the shipments moved. His knowledge of the contract between applicant and his company on or before the statutory date was derived from conversations with other officials of his company.

The treasurer of the Beveridge Paper Company of Indianapolis testified that applicant, under a verbal agreement, transported waste paper board manufactured by the company, to points in the territory embraced in the applica- [fol. 28] tion on and prior to the statutory date. This service was principally to such points as Louisville, St. Louis, Chicago, Milwaukee, and Cincinnati, as this manufacturer distributes its products only through jobbers in the larger cities. The witness was unable to specify any particular shipment to any specific point in the territory. The verbal agreement between the company and applicant did not differ from agreements between the company and other motor carriers on or about July 1, 1935.

A representative of the Standard Nut Margarine Company of Indianapolis, which manufactures oleomargarine, testified to transportation by applicant for his company throughout the territory claimed, except to Milwaukee. The witness specified three shipments, weighing 10,000 pounds each, as having been transported by applicant to Cincinnati on January 2 and 8, 1934, and to Peoria, Ill., on February 28, 1934, respectively, and a shipment weighing 22,000 pounds to Peoria on March 6, 1934. The agreement between the company and applicant provided for service to Chicago, but the witness was unable to locate any records of shipments thereto prior to July 1, 1935. Prior to that date this company had contracts or agreements with other contract and common carriers. The witness was unable to specify other shipments to specific points in the territory.

Stokely Brothers & Company and Van Camp's Inc., can fruits and vegetables at 11 points in Indiana and distribute their products generally throughout the territory sought by applicant. Their representative testified respecting applicant's service for them on, prior, and subsequent to July

1, 1935, throughout such territory. He was unable to identify any specific shipments as having been transported by applicant on any definite date and stated that the company's records had been destroyed in a flood, and that it was im- [fol. 29] possible to recall the details of any such shipments. The agreement relative to applicant's services for these companies was oral and entered into with applicant's president in 1934. It provided for termination on 15 days' notice by either party and did not differ from arrangements between these companies and other carriers serving them on and prior to July 1, 1935, and until some time in August 1937, when bilateral contracts were entered into with the contract carriers.

None of the supporting witnesses testified relative to the transportation by applicant of malt liquors or beverages.

Contracts providing for intrastate transportation in Indiana, between applicant and the Old Quaker Distillery, Hoosier Panel Company, and Indiana Condensed Milk Company, executed May 27, 1935, January 13 and 28, 1936, respectively, were filed August 26, 1935, and January 16 and March 4, 1936, respectively, with the Public Service Commission of Indiana.

Pursuant to a stipulation entered into at the hearing by all parties of record, applicant, subsequent thereto, furnished for the record a digest or abstract of shpiments handled by it since prior to July 1, 1935, compiled from shipping documents in its possession, and compared with such documents by certain of protestants' counsel and those of the applicant.

The digest shows the transportation of alcoholic liquors in June 1935, consisting of 32 truckloads and one less-than-truckload shipment from Lawrenceburg to Chicago, eight truckloads from the same origin to Cincinnati and some 69 shipments between Lawrenceburg and Fort Wayne, Indianapolis, Gary, Terre Haute, and South Bend, Ind., of which all but seven were truckloads.[4] The digest also shows two truckload shipments of bottles from Indianapolis [fol. 30] to Cincinnati, seven shipments of bottles from Lawrenceburg to Terre Haute, of various weights, but

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[4] Shipments from Lawrenceburg to other points in Indiana are alleged to have moved over interstate routes.

mostly truckloads, two shipments of canned goods from Indianapolis to Cincinnati, one shipment of paper from Indianapolis to Chicago, one from the same origin to Aurora, Ill., and two shipments of meat from Chicago to Indianapolis. Two shipments of alcoholic liquors are shown on the digest as having moved from Frankfort, Ky., to Chicago, but there appears to have been no shipping documents to support these movements. The digest shows the movement of many commodities to numerous points in 1937, of which the principal part consisted of alcoholic liquors and empty containers to and increased number of destinations, particularly in Illinois. In addition, for that year the digest shows the movement of canned goods, oleomargarine, butter and waste paper board. Other than alcoholic liquor, the bulk of the shipments within a recent period, except for a few scattered movements of other commodities, has consisted of canned goods and waste paper board from Indianapolis to Chicago, and packing-house products and meat from Chicago to Indianapolis.

Many of the bills of lading from which the digest was compiled bore the name of Ziffrin Truck Lines, or some variation thereof, but in most instances the delivery receipt appears to have been that of the applicant. The record shows that in general the bills of lading were made out by the shippers, and, in the light of the evidence, it is not unreasonable to assume the existence of some confusion in the minds of the shippers or their employees as to whether applicant or the common carrier company was involved in the transportation.

As previously noted, applicant originally sought authority to transport general commodities within a more ex- [fol. 31] tensive territory than that now claimed. In the statement relative to the scope of applicant's operation, pursuant to which the March 12, 1938, order was entered, it was represented on applicant's behalf by its president that, beginning with the date thereof, applicant's operations would be those set forth in the said statement and in the March 12, 1938, order, and hereinbefore described in marginal note 2. At the hearing it was contended on applicant's behalf that the statement was signed and applicant's operations voluntarily curtailed in accordance therewith on the implied promise of obtaining a permit without a formal hearing, and that applicant was entitled to authority under the "grandfather" clause with respect to

the commodities and territory described in marginal note 3, since the order did not become final. It is undisputed, however, that from the date of the statement, August 23, 1937, until some time in 1938, applicant did not operate in territory other than that embraced in the order and did not transport commodities other than those specified therein. Applicant, therefore, must be deemed to have abandoned its claim to conduct operations other than those hereinbefore described in marginal note 2. It is only necessary to consider whether the evidence justifies the right to continue the latter operations.

Applicant concedes that its documentary evidence does not support the broad claims of the application, but contends that in the circumstances the testimony of its president and supporting witnesses, hereinbefore discussed, should control, and that such testimony sufficiently establishes the scope and continuity of its operations on the statutory date and since. We are unable to agree with this contention. Applicant's parol evidence is so vague and indefinite as to make it impossible for us to grant the au- [fol. 32] thority sought solely on the basis of such evidence. For example, such evidence does not set forth in such detail as to be readily identified, specific shipments to a sufficient number of points in Illinois, Indiana and Ohio, prior to July 1, 1935, as to be considered representative of service to all points in these States. We have frequently said that where the record as a whole is such as to raise a substantial doubt as to the quality and accuracy of parol evidence, and in fact tends to rebut it, the burden is upon an applicant to overcome the doubt. That burden is not met by general testimony lacking in specific details standing alone. See *Tri-State Transportation Company Common Carrier Application*, 7 M. C. C. 707, and *McCarthy Common Carrier Application*, 17 M.C.C. 763.

Applicant argues that in the circumstances here present we should accept the testimony of its witnesses as conclusive. In support of this contention reference is made to two affidavits, submitted with the digest of documentary evidence subsequent to the hearing, but not accepted as evidence by the examiner. One, by applicant's president, was to the effect that in moving applicant's office records, on or about April 1, 1938, all the documentary evidence presented to our Bureau of Motor Carriers' supervisor in the informal proceeding was misplaced, and could not be

located when the digest was prepared. The other affidavit, by the supervisor, was to the effect that documentary evidence was presented to him during the informal consideration of the application, which, in his opinion, justified the authority included in the March 12, 1938, order.

These affidavits, in our opinion, are insufficient to supply the deficiency in the documentary evidence, and to overcome the burden resting upon applicant of justifying the [fol. 33] authority sought. In our formal proceeding, we are not bound by the results of informal conferences between the parties and our representatives. See *Manhattan Transit Co.* v. *United States*, 24 Fed. Supp. 174. Moreover, it does not appear that applicant exhausted all possible efforts to furnish the best evidence available in lieu of the documentary evidence claimed to have been lost. All but one of the shippers' representatives indicated that their companies were in possession of documentary evidence respecting applicant's transportation for them. These shippers apparently made out bills of lading and freight bills. It is not unreasonable to assume that they had duplicates of such documents in their possession from which applicant could have presented a more comprehensive digest of its operations, if, in fact, such operations were more extensive than indicated by the digest of record.

Upon the evidence before us we conclude that applicant's operations on July 1, 1935, which have since been continued, consisted of the transportation of alcoholic liquors from Lawrenceburg, and Louisville to Chicago, Cincinnati, Indianapolis, Gary, Fort Wayne, Terre Haute, and South Bend, and of returned shipments of alcoholic liquors, empty containers, labels and other liquor-distilling supplies from Chicago, Cincinnati, Indianapolis, Gary, Fort Wayne, Terre Haute, and South Bend, to Lawrenceburg and Louisville; oleomargarine from Indianapolis to Cincinnati and Peoria; canned and preserved food products from Indianapolis to Cincinnati and Chicago; meats and packing-house products from Chicago to Indianapolis, and waste paper board from Indianapolis to Chicago and Aurora.

Applicant's Status Under the Act. Some of the protestants contend that applicant's operations as of the statu- [fol. 34] tory date were those of a common, rather than a contract carrier. Their arguments on this point are predicated largely on the close relations between applicant and the common carrier company, rather than on the nature of

applicant's service. They take the position that the operations under consideration are in reality part of the operations of the common carrier company. It is reasonably clear from the record, however, that applicant's service was never held out generally to shippers in the sense in which a common carrier holds out, and that the nature of applicant's service was essentially different from that which we generally understand to be common carrier service. It began as a service to the liquor distilleries, and that service has been continuous. It has always been confined to a relatively few shippers, and these might be classed roughly as distillers or manufacturers. In addition to being so limited, applicant's service has always been rendered under some type of agreement or contract. Although in some respects applicant's service on and prior to July 1, 1935, resembled that of a common carrier, we are of the opinion that the operation was that of a contract carrier by motor vehicle.

Applicant's Affiliation With The Common Carrier Company. The portion of the order of hearing which brings this matter in issue provides as follows:

Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC-2510), and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of section 5 (6), Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of section 210 of said Motor Carrier Act, 1935.

Applicant strenuously opposes the consideration of this issue, and contends that we are without jurisdiction to enter [fol. 35] an adverse order thereon, because the quoted portion of the order is void. Applicant particularly questions the legality of any inquiry into the corporate relations between the two companies, because of the reference to section 5 (6) of Part I, of the Interstate Commerce Act, as then constituted, which, it contends, had no application whatever to motor carriers. It is true, of course, that the only

provisions of Part I of the act then applicable to carriers subject to regulation under Part II were made so by specific reference in the latter part of the act. It is clear, however, that what is implied in the quoted portion of the notice of hearing is the question of relations between the two companies. The section of Part I to which reference is made appropriately describes relations between motor carrier corporations engaged in common and contract carrier service between the same points or in the same territory, which would properly be subject to inquiry under section 210 of the act, relative to dual operations. The order does not require applicant to do anything under an inapplicable provision of Part I. For the purpose of the inquiry the language in section 213 (b) (1) of the act as it then read[8] might just as readily have been employed, which, except that it related to motor instead of rail carriers, contained the same language as section 5 (6) of Part I, prior to an amendment of Part II on June 28, 1938. Prior to such amendment the paragraph referred to provided that:

It shall be unlawful for any person, except as provided in paragraph (a), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more motor [fol. 36] carriers which are not also carriers by railroad, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this part and in violation of this paragraph. As used in this paragraph, the words, 'control or management' shall be construed to include the power to exercise control or management.

The amendment added, after the phrase, "carriers by railroad" in line 6, the following language: "or of one or more such motor carriers and one or more carriers other than motor carriers".

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[8] Effective September 18, 1940, these provisions as amended, were incorporated in section 5 of Part I of the act, and section 213 was repealed.

The inquiry as to relations between the companies arose by reason of certain of the findings in *Ziffrin Truck Lines, Inc., Common Carrier Application, supra,* and issues raised by certain protests and petitions filed herein. Likewise, the similarity of the names of the two carriers, the fact of their offices being in the same city, and the further fact that they serve many of the same points would naturally raise some question as to the relations between them. It will be noted from the appendix that the common carrier company has been authorized to serve a number of important points served by applicant, such as Chicago, Indianapolis, and Louisville.

In the report and order dealing with the application of the common carrier company, to which appropriate reference has been made in the record in this proceeding, it was found that the president thereof was also president of the applicant herein and that certain of the vehicles used in the service of both the common carrier company and applicant herein bore the names of both carriers, and were registered in the names of both companies. At least one of the drivers who testified in that proceeding was unable to state definitely which company employed him on or about the statu- [fol. 37] tory date, and one other driver had occasionally hauled for the applicant herein and had considered the president of the two concerns as his employer.

The record herein also shows that trucks are registered in the names of both applicant and the common carrier company. The same driver frequently operates a truck in one direction carrying shipments for applicant and on the return trip transports traffic for the common carrier company. Many of the vehicles display the names of both companies.

Applicant's president owns 98 percent of the stock of the common carrier company and manages that carrier. He also owns 49.5 per cent of the stock of the applicant, is a member of its board of directors, and he and a sister together own 50.5 percent of its stock. Another individual, also a director, who owns 49 percent of the stock, lives in the State of New York, and has not attended a meeting of applicant's board of directors for over 2 years. It is clear that applicant's president, although owning slightly less than a majority of its stock, is in a position to exercise control of applicant as well as the common carrier com-

pany. See *United States* v. *Union Pac. R. Co.*, 226 U. S. 61, 95 and 96.

Although the records of the two corporations are now kept separately, at one time they were so comingled that an order was entered February 7, 1936, by the Public Service Commission of Indiana, pursuant to a hearing held October 22, 1935, which required the two concerns to keep separate and distinct records. Many of the shippers who have dealt with applicant regard Sam Ziffrin as the person who completely controls the two companies. One of the witnesses, when interrogated as to whether, prior to October 1936, certain traffic moved in applicant's trucks or in [fol. 38] those of the common carrier company stated: "You will have to call and ask Mr. Ziffrin how he handles that material. I do not have any supervision over that."

The Applicability of Section 210 of the Act. Upon this record it is clear that applicant and the common-carrier company are affiliated and operated under common control and management, and we so conclude. It remains to be determined whether the granting of a permit to the applicant herein is precluded by section 210 of the act, which provides as follows:

> Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—(1) No person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and (2) No person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route of within the same territory.

Applicant contends that this section has no application to the facts under consideration because (a) it and the common-carrier company are separate corporations, holding different types of State authority and rendering different services, (b) the two corporations were in existence prior to the enactment of Part II of the act, and (c) the application of the common carrier company has been determined. Applicant also places much stress upon the fact that the section relates to the holding of dual authority by [fol. 39] the same person and, in effect, argues that more than one person is here involved, due to the existence of the separate corporations.

"Person," as used in section 210 and elsewhere in the act, is defined in section 203 (a) (1) thereof as meaning:

> • • • any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

The common-carrier company is authorized to transport general commodities, with certain exceptions, from or to all of the points which applicant is found to have served on July 1, 1935, and since, except South Bend, Ind., and Aurora, Ill. General commodities include those which we have concluded applicant has been transporting. In view of these facts, the grant of a permit to applicant herein would place in the hands of the same person, as "person" is defined in the act, authority to conduct operations both as a common and as a contract carrier in respect of the same commodities and between the same points. In dealing with individual carriers, we have uniformly imposed conditions which would prevent any such carrier from conducting operations as both a common and contract carrier, where the operations would be competitive as to commodities and territory. Under applicant's theory, we would be prevented from imposing restrictions herein to prevent competitive common and contract carrier operations solely because we are dealing with separate corporations. In other words, because the operations of two corporations are involved, we would be unable to impose the restrictions against dual operation which we impose in the case of individual applicants, in spite of the common management and control of applicant and the common carrier company. We do not believe that this is the law, and our belief in

[fol. 40] this respect is confirmed by our own decisions and those of the courts.

The general view of the courts as to the separation of identities of corporations and the individuals composing them, is well stated in 13 American Jurisprudence, 160, as follows:

> The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, would be disregarded by the court.

It was also said in *Metropolitan Hauling Company* v. *Snyder*, 79 Fed. (2) 263:

> There has been a growing tendency upon the part of the courts to disregard corporate entity and to treat the stockholders thereof as an association of individuals when the interests of justice are to be served, (citing among other cases, *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic and Commerce Assoc.*, 247 U. S. 490).

The view of the Supreme Court upon the question is thus stated in *New Orleans Ice Co.* v. *Helvering*, 292 U. S. 435:

> As a general rule a corporation and its stockholders are deemed separate entities * * *. Of course the rule is subject to the qualification that the separate identities may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights.

In *Bigelow Brothers, Inc. Contract Carrier Application*, 4 M. C. C. 711, where both Bigelow Brothers, Incorporated, and Bigley Trucking Corporation sought authority under the "grandfather" clauses of the act in the same territory, division 5 said:

> The same individuals own the stock and manage the affairs of both corporations. Each applicant holds title to certain motor vehicle equipment, which, however, is used indiscriminately by both. Applicants are engaged in a single business and are, therefore, entitled to only one permit or certificate.

In the case of a motor common carrier corporation seeking to acquire control of a contract carrier, or vice versa, [fol. 41] under the provisions of the act, now included in section 5 of Part I, we have applied section 210, and either denied the application for authority to purchase, or so conditioned our approval thereof as to preclude the possibility of dual operation. Illustrative of our policy is *Oilfields Trucking Co.-Purchase-Dunbar*, 5 M. C. C. 137, wherein division 5 said:

When common-carrier and contract carrier status are combined in the same person, the opportunities for unfortunate complications are great, * * *. The facts in the present case, as distinguished from those in the case just cited (*Nelson Extension of Operations*, 1 M. C. C. 285) show that applicant's services as a common and contract carrier not only would be competitive, but also would concern the same class of shippers. * * * Everything considered, applicant has not shown that it would be consistent with the public interest for it, a common carrier, to acquire the operating rights of vendor, a contract carrier. Accordingly, an order will be entered denying the application.

In *Universal Service, Inc.—Purchase—W. R. Arthur & Co. Inc.*, 15 M. C. C. 247, Universal Service, Incorporated, of Milwaukee, Wis., operating as a common carrier of automobiles between points in Illinois and Wisconsin, sought authority to purchase, for 145 shares of its capital stock, certain operating rights of W. R. Arthur & Company, Incorporated, of Janesville, Wis., a contract carrier of automobiles to points and places in Illinois, Indiana, Iowa, and Wisconsin, and a common carrier of automobiles by drive-away in 29 States and by truck-away in 8 States, including those served as a contract carrier. Arthur also sought to acquire control of Universal by purchase of the latter's capital stock. The purpose was to eliminate the dual operations of Arthur by transferring its common carrier operations to Universal, Arthur to continue operations only under its claimed contract-carrier rights. Division 5 said:

* * * such common carrier and contract-carrier operations would be conducted, respectively, by separate corporate entities, but under common control and management. * * * We are not convinced that the objectionable

[fol. 42] features incident to dual operations by a single carrier, which we are authorized to prevent under the provisions of section 210, would be obviated here merely by the expedient of dividing the rights for operation by separate corporate entities. In any event the present record does not contain evidence in justification for such operations or otherwise warranting findings that these transactions would be consistent with the public interest, involving as they do effectuation of common control of two corporations, one of which would operate as a contract carrier and the other as a common carrier, transporting the same commodities in the same territory in part, and serving the same class of shippers. • • • Evidence sufficient to support the required statutory findings not having been adduced, the applications will be denied.

Individuals or single corporations which instituted both common and contract carrier operations prior to the enactment of Part II are not exempt from the provisions of section 210 even though the rights claimed are based on the "grandfather" clauses of the act. See *M. Moran Transp. Lines, Inc., Common Carrier Application*, 23 M. C. C. 139, 149. It certainly could not have been the intent of Congress to exempt from the operation of the section the individuals who were engaged in both types of operation prior to the act through the media of separate corporations.

We therefore conclude that the section applies where two affiliated corporations, under common control and management, claim both common and contract carrier operations between the same points or in the same territory.

Applicant's counsel argue that even if common control of applicant and the common carrier company existed, (which they contend is not the case), the holding of both forms of authority by the two companies would be consistent with the public interest and the national transportation policy. They rely on the support of the application by the shippers who have used, and are desirous of continuing to use, applicant's service as a contract carrier. The testimony of [fol. 43] these witnesses does not, however, establish that the holding of authority permitting dual operation by applicant and the common carrier company would be consistent with the public interest. The discrimination which the section is intended to obviate is always present when the same persons are able to offer both kinds of service in respect of the same commodities and between the same points.

Applicant's president solicits traffic for the common carrier company and he conceded that its customers had approached him with reference to entering into contracts with applicant, and that there was competition between the two companies. Only two points, Aurora and South Bend, are included in the operations which the record shows applicant has been engaged in continuously as a contract carrier, which are not included in the authority granted the common carrier company. Operations to these points, however, would necessarily be conducted over the routes or within the territory served by the common carrier company. They are within short distances, respectively, of Chicago, and Plymouth, Ind., points on routes served by the common carrier company, and the latter is not precluded from interchanging traffic destined to Aurora and South Bend with other common carriers at Chicago and Plymouth, thereby retaining substantial portions of the hauls. We conclude that continuance of the operations which the record shows applicant to have been engaged in as a contract carrier on July 1, 1935, and since, would not be compatible with the requirements of section 210 of the act, and that under the circumstances we are without authority to grant the permit sought.

Findings

1. We find that applicant was on July 1, 1935, and continuously since has been engaged in operation as a contract carrier by motor vehicle in interstate or foreign commerce [fol. 44] over irregular routes, of (a) alcoholic liquors from Louisville, Ky., and Lawrenceburg, Ind., to Chicago, Ill., Cincinnati, Ohio, Indianapolis, Gary, Fort Wayne, Terre Haute, and South Bend, Ind., and of returned shipments of alcoholic liquors, empty containers, labels, and other liquor-distillery supplies from Chicago, Cincinnati, Indianapolis, Gary, Fort Wayne, Terre Haute, and South Bend to Louisville and Lawrenceburg; (b) oleomargarine from Indianapolis to Cincinnati and Peoria, Ill.; (c) canned and preserved food products from Indianapolis to Cincinnati and Chicago; (d) meats and packinghouse products from Chicago to Indianapolis, and (e) waste paper board from Indianapolis to Chicago and Aurora, Ill.

2. We further find that applicant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle, are owned, con-

trolled and managed in a common interest, and that under section 210 of the act the holding of a permit by applicant, authorizing the operations just described would not be consistent with the public interest and with the national transportation policy, and that the application herein should be denied.

An order denying the application will be entered.

LEE, *Commissioner*, concurring in part:

I agree with the report except for the second finding which is based upon the conclusion that we are without authority to grant the permit because of the dual operations. Under similar facts in *New York & New Brunswick Auto Exp. Co., Inc., Com. Car. App.*, 23 M. C. C. 663, we granted a certificate to a common carrier corporation and a permit to a contract carrier corporation on condition that within 90 days they would make a satisfactory showing that they were no longer under any common control in any degree whatever. There is no reason for not allowing applicant the same sort of privilege in this case as an alternative to denial of the application. Unless there is absolutely no other means of solving the problem, it would not seem necessary to wipe out this contract carrier business.

[fol. 45] APPENDIX

Ziffrin Truck Lines, Inc., the common carrier, has been authorized to transport general commodities, except livestock, explosive, inflammable articles, commodities in bulk and those of unusual value between the following points [1]:

Between Plymouth, Ind., and Louisville, Ky., and intermediate points, serving Tipton, Ind., and as an off-route point.

Between Chicago, Ill., and Cincinnati, Ohio, including intermediate points, between Riverdale, Ill., and Whiting, Hammond, and Gary, Ind., on the one hand, and U. S. Highway 41, on the other, over city streets.

Between Cincinnati, Ohio, on the one hand, and Newport and Covington, Ky., on the other, over city streets between those points.

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[1] The routes are set forth in *Ziffrin Truck Lines, Inc., Common Carrier Application*, 6 M. C. C. 722.

Between Indianapolis and Cincinnati including intermediate points.

Between Chicago and Indianapolis but not including intermediate points.

Between Joliet, Ill., and Plymouth, Ind., but not including intermediate points.

Between the junction of U. S. Highway 31 and Indiana Highway 38, on the one hand, and the junction of Indiana Highways 1 and 44 on the other, but not including intermediate points.

Between Indianapolis and Peoria, Ill., but not including intermediate points.

Between the junction of U. S. Highway 150 and Illinois Highway 9 and Pekin, Ill., but not including intermediate points.

Between Indianapolis and Muncie, Ind., and intermediate points.

Between the junction of U. S. Highways 40 and 35 and Greenville, Ohio, but not including intermediate points.

Between Joliet, Ill., and the jnction of U. S. Highways 30 and 152 but not including intermediate points.

[fol. 46] Between Indianapolis and Evansville, Ind., and intermediate points.

Between Indianapolis and Vincennes and intermediate points, including the off-route point of Martinsville, Ind.

Between Indianapolis and Fort Wayne, Ind., and intermediate points, serving the off-route point of Elwood, Ind., and the off-route point of Frankton, Ind.

Between Oxford and Cincinnati, Ohio, and intermediate points.

[fol. 47] ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 29th day of May, A. D. 1941.

No. MC-2511

ZIFFRIN INCORPORATED CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its

findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application be, and it is hereby, denied effective July 15, 1941.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 48] EXHIBIT "B" TO COMPLAINT

Supplemental Information Pertaining to Grandfather Application

MC 2511

1. Ziffrin, Inc.,
2. 1231 West Morris Street, Indianapolis, Indiana,
3. Corporation incorporated in the State of Indiana.
4. Lease about 50 tractors and 50 semi-trailers; none owned.
5. Insurance has been filed with the I. C. C.
6. Schedule has been filed and contracts have been filed in compliance with Ex Parte MC 9;
7. Property
8. B.

I & II

b.

Commodity	From	To
Whiskey, in cases or barrels,	Lawrenceburg, Ind.	Indiana (interstate account route used) Illinois St. Louis, Missouri Louisville, Ky. Ohio
	Cincinnati, Ohio	Indianapolis, Ind. Lawrenceburg, Ind. Chicago, Ill.
	Louisville, Ky.	Indianapolis, Ind.
	Terre Haute, Ind.	Lawrenceburg, Ind. (Interstate account route used) Louisville, Ky.
	Peoria, Illinois	Indianapolis, Ind. Lawrenceburg, Ind. Cincinnati, Ohio
Canned and preserved food products:—canned vegetables and fruits, soups, sauces, salad dressings, oleomargarine, peanut butter	Indianapolis, Ind. Martinsville, Ind. Tipton, Ind. Greenwood, Ind.	Chicago, Ill. Peoria, Ill. Cincinnati, Ohio Louisville, Ky.

Commodity	From	To
Manufactured paper and paper board, of all kinds	Indianapolis, Ind.	Chicago, Ill. Louisville, Ky.
Packing house products	Chicago, Ill.	Indianapolis, Ind. Anderson, Ind. Elwood, Ind. Tipton, Ind. Frankton, Ind. Muncie, Ind.
[fol. 49]		
Empty bottles, labels, and distillers' supplies	Indianapolis, and Terre Haute, Ind., Alton and Chicago, Ill., and Winchester, Ind.	Lawrenceburg, Ind. Cincinnati, Ohio Louisville, Ky.

9. Proof as submitted in BMC 1; letter attached hereto; freight bills and bills of lading presented to and examined by the Supervisor.

10. On account of my different interpretation of the Act, I have made several changes since July 1, 1935, but effective at once the above will be my exact operation.

11. I certify the above to be a true and correct statement of facts to the best of my knowledge and belief.

August 23, 1937.

Ziffrin, Inc., by S. Ziffrin, President.

The applicant, Ziffrin, Inc., by S. Ziffrin, President, and the District Supervisor, W. L. Snodgrass, agree that the applicant is entitled to under the Motor Carrier Act, 1935, and should receive a Permit as a Contract Carrier-Property as follows:

Whiskey, in cases or barrels, between all points in the states of Indiana, Illinois, Ohio, St. Louis, Mo. and Louisville, Ky.

Canned and Preserved Food Products; canned vegetables, canned fruits, canned soups, sauces, salad dressings, oleomargarine, peanut butter, from Indianapolis, Martinsville, Tipton, and Greenwood, Ind., to Chicago and Peoria, Ill., Cincinnati, Ohio, and Louisville, Ky.

Manufactured Paper and Paper Board, of all kinds, from Indianapolis, Ind., to Chicago, Ill., and Louisville, Ky.

Packinghouse Products, from Chicago, Ill., to Indianapolis, Elwood, Anderson, Frankton, Tipton, and Muncie, Indiana.

Empty bottles, labels, and other distillers' supplies, from Indianapolis, Ind., Terre Haute, Ind., Winchester, Ind., Chicago, Ill., and Alton, Ill., to Lawrenceburg, Ind., Louisville, Ky. and Cincinnati, Ohio.

Applicant further agrees for the Interstate Commerce Commission to act upon this application without a public hearing.

Ziffrin, Inc., by S. Ziffrin.

W. L. Snodgrass, District Supervisor, 141 S. Meridian St., Indianapolis, Indiana.

[fol. 50] EXHIBIT "C" TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 12th day of March, A. D. 1938.

No. MC 2511

APPLICATION OF ZIFFRIN, INC., INDIANAPOLIS, INDIANA

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215 and 218 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of contract carrier rate publications and filing and approval of evidence of security for the protection of the public, and with the requirements established in Contracts of Contract Carriers,* 1 M.C.C. 628, a permit shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order,* unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That if applicant or any other party in interest desires to protest the issuance of such permit, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order,* a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said permit be withheld pending further investigation and order by the Commission. Otherwise such protests shall be denied.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 51] Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 12th day of March, A. D. 1938

No. MC 2511

Application of Ziffrin, Inc., Indianapolis, Indiana

The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:

Whiskey,

From Lawrenceburg, Ind., to St. Louis, Mo., Louisville, Ky., and points and places in Indiana, Illinois, and Ohio.

From Cincinnati, Ohio, to Chicago, Ill., Lawrenceburg and Indianapolis, Ind.

From Louisville, Ky., to Indianapolis, Ind.

From Terre Haute, Ind., to Louisville, Ky., and Lawrenceburg, Ind.

From Peoria, Ill., to Cincinnati, Ohio, Indianapolis and Lawrenceburg, Ind.

Distillery supplies, including bottles and labels,

From Indianapolis, Terre Haute, and Winchester, Ind., and Chicago and Alton, Ill., to Lawrenceburg, Ind.; Cincinnati, Ohio, and Louisville, Ky.

Canned and preserved food products,

From Indianapolis, Martinsville, Tipton, and Greenwood, Ind., to Louisville, Ky., Cincinnati, Ohio, and Chicago and Peoria, Ill.

Paper and paper products,

From Indianapolis, Ind., to Chicago, Ill., and Louisville, Ky.

Packing house products,

From Chicago, Ill., to Anderson, Indianapolis, Muncie, Elwood, Tipton, and Frankton, Ind.

Return, with no transportation for compensation except as otherwise authorized herein, to above-specified origin points.

[fol. 52] EXHIBIT "D" TO COMPLAINT

STATE OF INDIANA,
County of Marion, ss:

LUTHER SNODGRASS, being first duly sworn, deposes and says:

1. That he is now and was on August 23rd, 1937, a District Supervisor for the Bureau of Motor Carriers of the Interstate Commerce Commission with headquarters in the City of Indianapolis, Ind.

2. That such a District Supervisor there was referred to him for investigation, report, and recommendation the application in MC 2511 (Form B. M. C. 1), being the "Grandfather Clause" application of Ziffrin, Incorporated, of Indianapolis, Indiana.

3. That in connection with his investigation of said application in MC 2511 he requested Mr. Sam Ziffrin, President of the applicant, to come to his office for the purpose of giving said Ziffrin an opportunity to submit documentary

evidence and proof relative to the "Grandfather Clause" operations of said Ziffrin, Incorporated, as claimed in the application filed in MC 2511.

4. That on or about August 23rd, 1937, in response to said request said Sam Ziffrin came to his office and submitted detailed proof relative to the "Grandfather Clause" rights of said Ziffrin, Incorporated, including documentary evidence.

5. That said documentary evidence included original records of said Ziffrin, Incorporated, such as freight bills, bills of lading, and delivery receipts, showing shipments transported by the applicant in interstate commerce on or about, before and since July 1st, 1935.

[fol. 53] 6. That he personally inspected and examined said documentary evidence, including said freight bills, said bills of lading, and said delivery receipts, and satisfied himself that said documentary evidence, including said freight bills, said bills of lading, and said delivery receipts, dated on or about, before and since July 1, 1935, were authentic and actual original records of said Ziffrin, Incorporated.

7. That it was and is his opinion that said documentary evidence clearly established the "Grandfather Clause" rights of said Ziffrin, Incorporated, for the transportation of the following commodities in the following described territory:

Alcoholic Liquors, in cases or ballels, between all points in the states of Indiana, Illinois, Ohio, St. Louis, Mo. and Louisville, Ky.

Canned and Preserved Food Products; canned vegetables, canned fruits, canned soups, sauces, salad dressings, oleomargarine, peanut butter. From Indianapolis, Martinsville, Tipton, and Greenwood, Ind., to Chicago and Peoria, Ill., Cincinnati, Ohio, and Louisville, Ky.

Manufactured Paper and Paper Board, of all kinds. From Indianapolis, Ind. To Chicago, Ill., and Louisville, Ky.

Packinghouse Products. From Chicago, Ill. To Indianapolis, Elwood, Anderson, Frankton, Tipton, and Muncie, Indiana.

Empty bottles, labels, and other distillers' supplies. From Indianapolis, Ind., Terre Haute, Ind., Winchester, Ind.,

Chicago, Ill., and Alton, Ill. To Lawrenceburg, Ind., Louisville, Ky., and Cincinnati, Ohio.

[fol. 54] Further the affiant sayeth not.

(Signed) W. L. Snodgrass.

Subscribed and sworn to before me this 26th day of October, 1938. (Signed) Ruth Turner, Notary Public. My Commission expires: August 5, 1942. (Seal.)

[fol. 55] EXHIBIT "E" TO COMPLAINT

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 4th day of June, A. D. 1938.

No. MC 2511

APPLICATION OF ZIFFRIN, INC., INDIANAPOLIS, INDIANA

Upon consideration of the record in the above-entitled proceeding, and good cause appearing therefor;

It is ordered, That the order of March 12, 1938, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 56] EXHIBIT "F" TO COMPLAINT

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 23rd day of June, A. D. 1938.

No. MC 2511

In the matter of the application of Ziffrin, Incorporated, of 1231 West Morris Street, Indianapolis, Indiana, for a certificate of public convenience and necessity or permit, Form BMC 1, authorizing operation as a common or contract carrier by motor vehicle in the transportation of

commodities generally, in interstate commerce, between points located in the States of Indiana, Illinois, Ohio, Pennsylvania, New York, Iowa, Kentucky, Missouri, Wisconsin, and West Virginia, over irregular routes.

A more detailed statement of route or routes (or territory) is contained in said application, copies of which are on file and may be inspected at the office of the Interstate Commerce Commission, Washington, D. C., or offices of the boards, commissions or officials of the States involved in this application.

Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC 2510) and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of Section 5 (6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act, 1935.

It appearing, That the above-entitled matter is one which the Commission is authorized by the Motor Carrier Act, 1935, to refer to an examiner:

It is ordered, That the above-entitled matter be, and it is hereby, referring to Examiner A. E. Later for hearing on the 19th day of July, A. D. 1938, at 9 o'clock A. M. (standard time), at the Indiana Public Service Commission, Indianapolis, Indiana, and for recommendation of an appropriate order thereon accompanied by the reasons therefor;

It is further ordered, That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted.

It is further ordered, That notice of this proceeding be duly given.

And it is further ordered, That any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall advise the Bureau of Motor Carriers of the Commission, Washington, D. C., to that effect by notice which must reach the said Bureau within ten days from the

date of service hereof and that the date of mailing of this notice shall be considered as the time when said notice is served.

By the Commission, Division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 57] EXHIBIT "G" TO COMPLAINT

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of September, A. D. 1941.

No. MC 2511

ZIFFRIN INCORPORATED CONTRACT CARRIER APPLICATION
Indianapolis, Indiana

Upon consideration of the record in the above-entitled matter, of the petition of applicant for reconsideration, reargument, and rehearing, and petitions of certain shippers for intervention; and good cause appearing:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fols. 58-59] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION—October 21, 1941

The defendants, United States of America and Interstate Commerce Commission, and Francis Biddle, Attorney General of the United States, and W. P. Bartel, Secretary of the Interstate Commerce Commission, are, and each of them is, hereby notified that at 10 o'clock A. M. Central Standard Time on the 28th day of October, 1941, and in the Court Rooms of the United States District Court for

the Southern District of Indiana, Indianapolis Division, situated in the City of Indianapolis, Marion County, State of Indiana, or as soon thereafter as it may be heard, the plaintiff, Ziffrin, Incorporated will appear by counsel before the Honorable Robert C. Baltzell, United States District Judge for the Southern District of Indiana, and two other judges, one of whom shall be a Circuit Judge, called to his assistance pursuant to law, and then and there and in the above entitled cause, will move the said Court and judges thereof to grant plaintiff an interlocutory injunction restraining the defendants, and each of them, conformably with the prayer of the Bill of Complaint of said cause.

(S.) Howell Ellis, John S. Powell, Attorneys for Plaintiff.

[fol. 60] (Marshal's Return Copied from Back of Notice)

Received this Notice and copy of Application for Motion for Interlocutory Injunction, at Indianapolis, Indiana, on October 22, 1941, and served same upon the within named United States of America by delivering a true copy of Notice and copy of Application for Motion for Interlocutory Injunction to B. Howard Caughran, the United States Attorney, at Indianapolis, Indiana, on October 22, 1941; and upon Francis Biddle The Attorney General of the United States of America, by mailing to him at Washington, D. C. a true copy of Notice and copy of Application for Motion for Interlocutory Injunction in an envelope registered at the U. S. Post Office at Indianapolis, Indiana, on October 22, 1941; upon the Interstate Commerce Commission, by mailing to W. P. Bartle, Secretary of the Interstate Commerce Commission at Washington, D. C. a true copy of Notice and copy of Application for Motion for Interlocutory Injunction in an envelope registered at the U. S. Post Office at Indianapolis, Indiana, on October 22, 1941.

Julius J. Wichser, U. S. Marshal, by Val Nolan, Jr., Deputy.

Marshal's Costs:

3 Services	$6.00
Postage and Registry fee	.48
	$6.48

[fol. 61] IN UNITED STATES DISTRICT COURT

ORDER CONVENING THREE-JUDGE COURT—October 21, 1941

The plaintiff in the above entitled cause is seeking to enjoin the enforcement of an order of the Interstate Commerce Commission and is asking for a temporary injunction, as well as a permanent injunction. The complaint in said action having been presented to the judge of the court, said judge, in accordance with the provisions of 28 U. S. C. A. 47, now, for the purpose of hearing and determining the issues herein, calls to his assistance the Honorable Sherman Minton, Judge of the United States Circuit Court of Appeals for the Seventh Circuit, and the Honorable John P. Barnes, Judge of the United States District Court for the Northern District of Illinois.

[fol. 62] IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING THREE-JUDGE COURT—October 28, 1941

Comes now the Honorable Evan A. Evans, Senior United States Circuit Judge, and files designation of Honorable Sherman Minton, United States Circuit Judge and the Honorable John P. Barnes, United States District Judge, to sit as Judges in this cause, which designation is as follows:

The assignment of two judges by the undersigned being required under Sec. 380a, 28 U. S. C. A., Act of 1937, I hereby designate and assign the Honorable Sherman Minton, United States Circuit Judge in and for the Seventh Judicial Circuit, and the Honorable John P. Barnes, United States District Judge for the Northern District of Illinois, to sit as judges in the above entitled cause.

Evan A. Evans, Senior United States Circuit Judge
in and for the Seventh Judicial Circuit.

Chicago, Illinois, October 24, 1941.

[fol. 63] IN UNITED STATES DISTRICT COURT

APPEARANCES

Come now B. Howard Caughran, Attorney for the United States and Daniel H. Kunkel and file appearance for defendants.

Come now B. W. LaTourette and G. M. Rebman and file appearance for Regular Common Carrier Conference of the American Trucking Association, Inc., intervener.

IN UNITED STATES DISTRICT COURT

ORDER RE INTERVENTION OF REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOC., INC.—October 29, 1941

Come now Regular Common Carrier Conference of the American Trucking Association, Inc., by their attorneys, B. W. LaTourette and G. M. Rebman, and by leave of court file a petition for leave to intervene, which said petition is granted and the petitioner is given leave to intervene.

IN UNITED STATES DISTRICT COURT

ORDER RE INTERVENTION OF JOSEPH E. SEAGRAM & SONS, INC., CALVERT DISTILLING CO., AND LOUISVILLE PROVISION CO.—October 29, 1941

Come now Joseph E. Seagram and Sons, Inc., Calvert Distilling Company, and Louisville Provision Company, by their respective attorneys T. Millege Galsphin and Marion E. Taylor, and file a motion for leave to intervene and said motion having been submitted to the Court is sustained and leave to intervene is granted and each of said parties file a separate intervening petition herein.

IN UNITED STATES DISTRICT COURT

ORDER RE INTERVENTION OF EMMETT J. WILLIAMS, ET AL.—October 29, 1941

Come now Emmett J. Williams and James E. Williams and all others similarly situated, by their attorney, Russell J. Dean and by leave of Court file a petition to intervene, which said petition is granted and the petitioners are given leave to intervene.

IN UNITED STATES DISTRICT COURT

ORDER RE FILING OF APPLICATION FOR INTERLOCUTORY INJUNCTION AND STAY ORDER—October 29, 1941

Come now the parties by their respective attorneys and the plaintiff presents its application and motion for interlocutory injunction and the court now requests the defendant, Interstate Commerce Commission to defer the enforcement of the order in controversey for a period of sixty (60) days from and after November 5, 1941, which request is granted by said defendant.

[fol. 64] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

APPLICATION AND MOTION FOR INTERLOCUTORY INJUNCTION—October 29, 1941

Comes now plaintiff, Ziffrin, Incorporated, a corporation, and moves the Court that an interlocutory injunction be granted against the United States of America and the Interstate Commerce Commission, defendants herein, suspending and restraining the enforcement, operation and execution of and setting aside an order of Interstate Commerce Commission approved May 29, 1941, marked Exhibit "A" and attached to the complaint in the above entitled cause, and restraining said defendants and their law enforcement officers, agents, servants and employees from taking any steps to enforce said order, all until the further order of the Court pending the hearing and decision of plaintiff's application for a permanent injunction enjoining the defendants, and each of them, conformably with the prayer of the Bill of Complaint herein.

Howell Ellis, John S. Powell, Attorneys for Plaintiff.

[fols. 65-66] IN UNITED STATES DISTRICT COURT

ORDER ASSIGNING CASE FOR HEARING—October 29, 1941

It is now ordered by the Court that this cause be, and it is, hereby assigned for final hearing on Monday, November 24, 1941, at 10:00 o'clock A. M. Plaintiff and interveners

are given to and including November 10, 1941, and defendants are given to and including November 15, 1941, within which to file their respective briefs upon the competency of proposed evidence to be introduced for final hearing.

[fol. 67] IN THE DISTRICT COURT OF THE UNITED STATES

[File endorsement omitted]

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed November 17, 1941

Now comes Interstate Commerce Commission, hereinafter called Commission, defendant herein, and in answer to the complaint filed in this case respectfully represents:

1. The Commission admits the averment of paragraph 1 of the complaint.

2. The Commission admits the averments of paragraphs 2, 3, 4, 5 and 6 of the complaint, insofar as they do not conflict with the statements and findings contained in the report of the Commission of May 29, 1941, attached to the complaint and marked "Exhibit A".

3. The Commission admits the averments of paragraphs 7 and 8 of the complaint.

4. In answer to paragraph 9 of the complaint the Commission admits the averment with respect to the receiving and filing of the application of the petitioner by the Commission, but denies the relevancy and materiality of all the other averments contained in said paragraph.

[fol. 68] 5. In answer to paragraph 10 of the complaint the Commission denies that any valid arrangement or agreement was entered into between a representative of the Commission and the petitioner and further denies the relevancy and materiality of said paragraph.

6. In answer to paragraph 11 the Commission admits that it issued the compliance order, a copy of which is attached to the complaint as Exhibit C, but denies that said order

approved the provisions of any agreement between a representative of the Commission and the petitioner.

7. The Commission denies the relevancy and materiality of the averments of paragraph 12 of the complaint.

8. The Commission admits the averments of paragraph 13 of the complaint and further avers that said order of March 4, 1938, was entered in conformity with the conditions of said order of March 12, 1938.

9. The Commission denies the relevancy and materiality of the averments of paragraph 14 of the complaint.

10. The Commission admits the averments of paragraphs 15, 16 and 17 of the complaint.

11. The Commission denies the averments of paragraph 18 of the complaint and for answer thereto refers to said order of June 23, 1938.

12. The Commission admits the averments of paragraph 19 of the complaint.

13. The Commission admits the averments of paragraph 20 of the complaint, but denies the relevancy or materiality of said averments.

14. The Commission admits the averments of paragraphs 21, 22, 23, 24, 25, 26 and 27 of the complaint.

15. In answer to paragraph 28 of the complaint the Commission denies that said orders of May 29, 1941, and No-
[fol. 69] vember 5, 1941, deprived the petitioner of its property in contravention of the Fifth Amendment to the Constitution of the United States.

16. The Commission denies the averments of paragraphs 29, 30, 31, 32 and 33 of the complaint.

17. The Commission admits the averments of paragraph 34.

18. The Commission denies the relevancy and materiality of the averments of paragraph 35 of the complaint.

19. The Commission denies the averments of paragraph 36 of the complaint.

And in further answer to the averments of the complaint, the Commission avers that said report and order of May 29,

1941, attached to and made part of the complaint as Exhibit A, were not made or entered either arbitrarily, capriciously or contrary to the relevant evidence or the law or without evidence to support them; that in making said report and orders referred to in the complaint the Commission did not exceed the authority which had been duly conferred upon it by law and the Commission denies each of and all the allegations to the contrary contained in said complaint, and except as herein expressly admitted the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict with the allegations herein or with the statements contained in said report of May 29, 1941.

All of which matters and things the Commission is ready to maintain and prove.

Wherefore, the Commission prays that the complaint herein be dismissed.

Interstate Commerce Commission, Daniel H. Kunkel, Attorney; Daniel W. Knowlton, Chief Counsel.

[fols. 70-71] *Duly sworn to by J. Haden Alldredge. Jurat omitted in printing.*

[fol. 72] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed November 17, 1941

The defendant, United States of America:

1. Admits the allegations of paragraph 1; those of paragraph 7 except the allegation that this action arises under the Fifth Amendment to the Constitution; those of paragraph 11 except the allegation that there was an agreement between representatives of the Commission and of plaintiff relative to the issuance of the compliance order dated March 12, 1938; the allegations of paragraphs 13, 24, 25, 26 and 27; the allegation of paragraph 38 that the effect of the Commission's order is to require plaintiff to cease

operations; the allegation of paragraph 34; and the allegation of paragraph 35 that plaintiff will be subject to penalties if operations are conducted in violation of the Commission's order and the Act.

2. Admits those allegations of paragraphs 8, 9, 15, 16, 17, 18, 19, 20, 21 and 22 which are in accord with the statement of the proceedings contained in the report of the Interstate Commerce Commission dated May 29, 1941, attached as Exhibit A to the complaint herein; and denies those inconsistent therewith.

3. Admits those allegations of paragraphs 2, 3, 4, 5, 6, 10, 12, 14, 23 and those contained in the last sentence of para- [fol. 73] graph 30 which are in accord with the findings of fact contained in the aforesaid report of the Interstate Commerce Commission; and denies those inconsistent therewith.

4. Denies the allegations of paragraph 28, except as admitted in paragraph 1 hereof; those of paragraphs 29; those contained in the first sentence of paragraph 30; those of paragraph 31, except it is admitted that Ziffrin Truck Line, Inc., did not, by name, receive notice of and participate in the hearing in this proceeding; those of paragraphs 32, 33 and 36; and those of all other paragraphs not herein specifically answered.

(S.) S. R. Brittingham, Jr., Special Assistant to the Attorney General. Thurman Arnold, Assistant Attorney General; B. Howard Caughran, United States Attorney.

[fols. 74-182] I certify that a copy of the foregoing answer of the United States was this day mailed to the following persons:

Howell Ellis & John S. Powell, Esqs., 524 Illinois Building, Indianapolis, Indiana, Attorneys for Plaintiffs. Daniel H. Kunkel, Esq., Interstate Commerce Commission, Washington, D. C., Attorney for Interstate Commerce Commission. Albert C. Sogemeier, Esq., Clerk, U. S. District Court, Southern District of Indiana, Indianapolis, Indiana. Emmitt J. Williams, Secretary-Treasurer, Local No. 135, International Brotherhood of Teamsters, Warehousemen and Helpers, Indianapolis,

Indiana. B. W. LaTourette, 314 North Broadway, St. Louis, Missouri. T. Milledge Galphin, Jr., Louisville, Kentucky. Woodward, Dawson & Holson, A. Shelby Winstead, Louisville, Kentucky. Frank H. Luther, General Traffic Manager, Joseph E. Seagram & Son, Inc., Seventh Street Road, Louisville, Kentucky. (S.) S. R. Brittingham, Jr., Special Assistant to the Attorney General.

November 15, 1941.

* * * * * * *

[fol. 183] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S SUGGESTED FINDINGS OF FACT—Filed January 27, 1942

1. Plaintiff, Ziffrin, Incorporated, is an Indiana corporation organized in 1933. Plaintiff brings this action under the Fifth Amendment to the Constitution of the United States and under the laws of the United States, more particularly under Section 205 (h) of the Motor Carrier Act of 1935, now Section 205 (g) of Part II of the Interstate Commerce Act (U. S. Code Sup. 1, Title 49, Sec. 305 (h)), and under the Acts of Congress, Code of Laws of the United States, Title 28, Sections 41 (28), 32 to 48 inclusive, to set aside, annul and enjoin the enforcement of an order of the Interstate Commerce Commission decided May 29, 1941, in its Cause No. MC-2511, entitled Ziffrin, Incorporated, Contract Carrier Application. In said order Ziffrin, Incorporated, was denied a permit to continue operations as a motor vehicle contract carrier in interstate and foreign commerce, as prayed in an application, as amended, seasonably filed pursuant to Section 209 (a) of the Motor Carrier Act of 1935, in the transportation over irregular routes of canned, preserved, and prepared foods, shoe polish and dressing, packing-house products and fresh meats, alcoholic liquors, distillery supplies, including bottles, milk, condensed and evaporated, dairy products, including oleomargarine, cheese, paper products or paper articles, steel and iron articles, and batteries, between all points and places in that part of the State of Kentucky within a radius of 150 miles of Louisville, all the State of Indiana, all the

State of Ohio, all the State of Illinois, St. Louis, Missouri, Milwaukee, Wisconsin, and points in Wisconsin interme- [fol. 184] diate between Milwaukee and Chicago, and that part of the State of Pennsylvania in and around the cities of Pittsburgh and Schenley. Ziffrin, Incorporated, claimed that it had been so engaged continuously since prior to July 1, 1935, in said operations, and brings this action alleging that the order of the Interstate Commerce Commission approved May 29, 1941, deprives it of its property without due process of law.

2. Said application was referred by the Interstate Commerce Commission to W. L. Snodgrass, its District Supervisor at Indianapolis, and after showings made by applicant to said Supervisor, said applicant and W. L. Snodgrass, Supervisor, entered into a written agreement dated August 23, 1937, in which applicant agreed to restrict its operations to those set out in said agreement, and said Supervisor and applicant agreed that Ziffrin, Incorporated, was entitled, without further proceedings and without public hearing, to a permit to transport the commodities set out in said agreement to points and places set out in said agreement.

On March 12, 1938, the Interstate Commerce Commission issued what is known as a compliance order stating that upon full compliance with Sections 215 and 218 of the Motor Carrier Act of 1935, a permit would be issued authorizing applicant to engage as a contract carrier by motor vehicle in interstate and foreign commerce in the transportation of commodities and in the territory set out in an appendix, which appendix authorized the same commodities and points and places as the agreement with the Supervisor. Said compliance order was subsequently, on June 4, 1938, vacated and set aside without any notice to Ziffrin, Incorporated.

[fol. 185] 3. On June 23, 1938, the Interstate Commerce Commission issued its order in Cause No. MC-2511, setting the cause for public hearing on July 19, 1938, at Indianapolis, Indiana, and giving notice that applicant would be required to make certain showings relative to the corporate relationship between applicant and Ziffrin Truck Lines, Inc., a common carrier, and that if said corporations are found to be affiliated within the meaning of Section 5 (6) of Part I, applicant must also establish that a permit may

be held consistently with the public interest and the policy declared in Section 202 (a) of the Motor Carrier Act of 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act of 1935.

Applicant contended that neither the section of Part I of the Interstate Commerce Act specified in the notice nor any other section of the Act gave the Interstate Commerce Commission authority in connection with a hearing on an application filed pursuant to the provisions of Section 209 (c) to examine into the corporate relationship of separate corporations, which corporate relationship, if any, was effectuated prior to the enactment of the Motor Carrier Act of 1935, and Ziffrin, Incorporated, objected to any proceeding being had pursuant to said notice. Over the objection of Ziffrin, Incorporated, hearings were held on September 12 and 13, 1938, and a record made concerning the operating rights of Ziffrin, Incorporated, and corporate relationship, if any, existing between it and Ziffrin Truck Lines, Inc., a common carrier.

4. Following said hearing, Ziffrin, Incorporated, filed a brief on the law and evidence with the Interstate Commerce Commission on November 22, 1938, and on March 18, 1939, the examiner for the Interstate Commerce Commission filed [fol. 186] his report and recommended order in Cause No. MC-2511, to which, on April 20, 1939, Ziffrin, Incorporated, filed its exceptions and request for oral argument, and on October 27, 1939, oral argument was held before Division 5 of the Interstate Commerce Commission, and on October 27, 1939, the case was submitted for decision.

5. Effective September 18, 1940, Section 210 of Part II of the Interstate Commerce Act was amended to include within its provisions the holding of a certificate and a permit by separate corporations under common management or control.

6. On May 29, 1941, Division 5 of the Interstate Commerce Commission issued its order in Cause No. MC-2511 finding, first, that Ziffrin, Incorporated, was on July 1, 1935, and continuously since has been, engaged as a contract carrier by motor vehicle in interstate and foreign commerce over irregular routes of certain commodities between certain points, and second, that Ziffrin, Incorporated, and Ziffrin Truck Lines, Inc., which holds a com-

mon carrier certificate, are owned, controlled and managed in a common interest, and that under Section 210 of the Act the holding of a permit by applicant authorizing the operations just described would not be consistent with the public interest and with the transportation policy, and that the application should be denied. The report and order of the Commission show that the Section 210 referred to is Section 210 of Part II of the Interstate Commerce Act, as amended, effective September 18, 1940.

7. On June 25, 1941, applicant filed with the Interstate Commerce Commission its petition seeking reconsideration, [fol. 187] reargument and rehearing, and on September 29, 1941, the Interstate Commerce Commission denied applicant's petition of June 25, 1941. At various stages of the proceedings had before this court, the effective date of said order was extended pending determination of this cause.

8. On October 21, 1941, Ziffrin, Incorporated, filed its complaint in this court seeking a temporary restraining order, interlocutory injunction, and final decree to vacate, set aside, and enjoin the enforcement of said order of the Interstate Commerce Commission dated May 29, 1941, in Cause No. MC-2511. On October 27, 1941, partial hearing was had on the motion for interlocutory injunction, at which time an agreement was had that the effective date of the order was to be extended during the pendency of these proceedings.

9. Ziffrin Truck Lines, Inc., the common carrier, was incorporated in 1934, and from prior to the enactment of the Motor Carrier Act of 1935, Sam Ziffrin has been president of both Ziffrin Truck Lines, Inc., and Ziffrin, Incorporated. Sam Ziffrin and members of his immediate family own all the stock and are the officers and directors of Ziffrin Truck Lines, Inc. Sam Ziffrin owns 495 shares of 1,000 shares of Ziffrin, Incorporated, and Rose Levy, his sister, owns 15 shares. The other stockholders of Ziffrin, Incorporated, and their stock holdings at the time of hearing before the Interstate Commerce Commission were as follows:

Sam Berman, Logansport, Indiana	390 shares
L. Berger, Arverne, New York	100 shares

The stock holdings of Sam Ziffrin, his family, and relatives have not been changed since prior to the enactment of [fol. 188] the Motor Carrier Act of 1935, and whatever common control and management or opportunity for common control and management results from this situation was effectuated and was in existence prior to the enactment of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act.

10. That the operation of Ziffrin, Inc., in interstate and foreign commerce produce annual revenues of approximately $500,000.00 and that the value of the property and business of Ziffrin, Incorporated, is not les than $500,000.00, and if the order of the Interstate Commerce Commission dated May 29, 1941, in Cause No. MC-2511 is permitted to become effective, substantially all of said value and business will be destroyed.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S SUGGESTED CONCLUSIONS OF LAW—Filed January 27, 1942.

1. That this Court has jurisdiction to hear and determine plaintiff's petition to vacate, set aside and enjoin the enforcement of the order of the Interstate Commerce Commission dated May 29, 1941, denying to plaintiff a permit to continue operations as a motor vehicle contract carrier of property.

2. Where confiscation is alleged, as in this cause, plaintiff is entitled at the trial before the Court, to introduce evidence in addition to that before the Commission, and seek from the Court findings of fact upon which the Court decides the constitutional question, and the Court has judicial power to examine the weight of evidence and exercise an independent judicial judgment upon the facts.

3. That Ziffrin, Incorporated, was in bona fide operation as a motor vehicle contract carrier in interstate and [fol. 189] foreign commerce on July 1, 1935, and has been so engaged continuously since, transporting over irregular routes canned, preserved, and prepared foods, shoe polish and dressing, packing house products and fresh meats,

alcoholic liquors, distillery supplies, including bottles, milk, condensed and evaporated, dairy products, including oleomargarine, cheese, paper products or paper articles, steel and iron articles, and batteries, between all points and places in that part of the State of Kentucky within a radius of 150 miles of Louisville, all the State of Indiana, all the State of Ohio, all the State of Illinois, St. Louis, Missouri, Milwaukee, Wisconsin, and points in Wisconsin intermediate between Milwaukee and Chicago, and that part of the State of Pennsylvania in and around the cities of Pittsburgh and Schenley.

4. The first finding in the Interstate Commerce Commission order of May 29, 1941, in Cause No. MC-2511 relative to operating rights of Ziffrin, Incorporated, denies due process of law to Ziffrin, Incorporated, for the reason that it disregards uncontroverted evidence in the record showing that the operations of Ziffrin, Incorporated, on July 1, 1935, and continuously since, have been more extensive both as to commodities and as to territory than is indicated in said finding of the Commission.

5. Section 210 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 310), effective September 18, 1940, for the first time made it unlawful under certain circumstances for separate corporations under common management or control to hold a certificate and a permit, and the application of that statute to facts and conditions developed on a record made prior to the enactment of said section 210 of Part II of the Interstate Commerce Act with the resultant denial of all operating rights of Ziffrin, In-
[fol. 190] corporated, was an ex post facto application of the statute, and a denial of due process of law to Ziffrin, Incorporated.

6. The notice of June 23, 1938, of the Interstate Commerce Commission setting Cause No. MC-2511 for public hearing and giving notice that applicant would be required to make certain showings relative to the corporate relationship between the applicant and Ziffrin Truck Lines, Inc., a common carrier, and that if they were found to be affiliated within the meaning of Section 5 (6) of Part I of the Interstate Commerce Act, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in

Section 202 (a) of the Motor Carrier Act of 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act of 1935, presumed a power in the Commission which was not conferred upon it by law. The action of the Commission in requiring Ziffrin, Incorporated, over its protest to participate in a hearing had pursuant to said defective and misleading notice was a denial of due process of law to Ziffrin, Incorporated.

7. The conclusion of the Interstate Commerce Commission that it is without authority to grant a permit to Ziffrin, Incorporated, on the ground that Ziffrin Truck Lines, Inc., holds a common carrier certificate, is contrary to law, since Section 210 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 210), effective September 18, 1940, does not prohibit the granting of a permit to one of two corporations under common management or control, when the other corporation holds a certificate, but prohibits the holding of a permit under those circumstances by the corporation itself unless there be a finding that the holding of a certificate by one corporation and the permit by the other corporation is consistent with [fol. 191] the public interest and the national transportation policy set out in the Interstate Commerce Act.

8. The finding of the Interstate Commerce Commission that the holding of a permit by Ziffrin, Incorporated, and the holding of a certificate by Ziffrin Truck Lines, Inc., would not be consistent with the public interest and with the national transportation policy, is not sustained by any substantial evidence in the record, and is a denial of due process of law to Ziffrin, Incorporated.

9. Considered in the entirety, the proceedings had before the Interstate Commerce Commission and the order in Cause No. MC-2511, approved May 29, 1941, deprives Ziffrin, Incorporated, of its property without due process of law, and said order is unlawful, invalid, and confiscatory, and should be vacated, set aside and its enforcement enjoined.

An appropriate decree will be entered.

In United States District Court

Plaintiff's Suggested Decree—Filed January 27, 1942

In the District Court of the United States for the Southern District of Indiana, Indianapolis Division

No. 448 Civil

Ziffrin, Incorporated, a Corporation, et al., Plaintiffs,

v.

United States of America and Interstate Commerce Commission, et al., Defendants

Decree

This cause came on for final hearing at 10 o'clock A. M. Central Standard Time on Saturday, January 17, 1942, [fol. 192] in the Court Rooms of the United States District Court for the Southern District of Indiana, Indianapolis Division, before a statutory Three Judge Court convened by the Honorable Robert C. Baltzell, United States District Judge in and for the Southern District of Indiana, by calling to his assistance the Honorable Sherman Minton, Judge of the United States Circuit Court of Appeals for the Seventh Circuit, and the Honorable John P. Barnes, United States District Judge in and for the Northern District of Illinois, pursuant to Section 205 (h) of the Motor Carrier Act of 1935 (U. S. Code, Sup. 1, Title 49, Sec. 305 (h)) and the Judicial Code, Title 28, Sec. 41 (28), 32 to 48 inclusive, upon the verified complaint and application for injunction of Ziffrin, Incorporated, plaintiff in said cause, that it be granted a final decree vacating, setting aside and enjoining the enforcement against the plaintiff of a certain order of the Interstate Commerce Commission in Docket No. MC-2511 decided May 29, 1941, entitled Ziffrin, Incorporated, Common Carrier Application, by enjoining the defendants named in said bill of complaint on the ground that said order violates the Constitution of the United States and the Fifth Amendment thereto, by taking plaintiff's property without due process of law, and the court having permitted the intervention of certain intervenors in behalf of the granting of the application and in opposition to the granting of the

application, and upon consideration of said verified bill of complaint and the answers filed by defendants herein, and after hearing evidence both in support of and in opposition to said application for an injunction, and after hearing statements and arguments of counsel for the respective parties to said cause and the consideration of briefs filed by the respective parties in said cause, and it appearing that said application for an injunction was [fol. 193] duly set for hearing at the time and place aforesaid, and that lawful notice has been given to the defendants and all parties in this cause and to the Interstate Commerce Commission and to the Attorney General of the United States, and said cause having been submitted to the court at the time and place aforesaid, it is ordered, adjudged and decreed by said Three Judge Court:

That the order of the Interstate Commerce Commission in its Docket No. MC-2511, decided May 29, 1941, be and it is hereby annulled, voided, vacated, and set aside, and defendants, United States of America and Interstate Commerce Commission, and each of them, and their law enforcement officers, agents, servants and employees, and each of them, be, and they are, and each of them is, hereby perpetually restrained and enjoined from bringing, and threatening to bring, either directly or indirectly, any civil, criminal or penal action or proceeding whatsoever, either at law or in equity, for the purpose of enforcing the provisions of said order of the Interstate Commerce Commission in its Docket No. MC-2511, decided May 29, 1941, entitled Ziffrin Incorporated Contract Carrier Application, and from threatening to cause any of plaintiff's officers, agents, representatives or employees to be arrested or prosecuted for violating any provision of said order of the Interstate Commerce Commission in its Docket No. MC-2511, decided May 29, 1941, entitled Ziffrin Incorporation Contract Carrier Application, and from taking and from threatening to take any other action whatsoever under said order of May 29, 1941; in any manner designed, intended or tending to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives, and employees, or any of them, in conducting motor vehicle contract carrier opera- [fols. 194-195] tions in interstate or foreign commerce conforming to the application, as amended, filed with the Interstate Commerce Commission on or before February 12,

1936, pursuant to Section 209 (a) of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, by Ziffrin, Incorporated, and docketed by the Interstate Commerce Commission under its Docket No. MC-2511.

It is further and hereby ordered that a copy of this order certified under the hand and seal of this court be served upon each of the defendants and upon the Honorable Francis Biddle, Attorney General of the United States, and that this order and the injunction hereby granted shall be binding upon all persons who have knowledge of the contents and purport thereof.

To the foregoing rulings of this court the defendants are granted exceptions.

This order signed and granted —— day of ——, 1942, at — o'clock — M.

——— ———, Judge of the Circuit Court of Appeals for the Seventh Circuit. ——— ———, Judge of the United States District Court for the Northern District of Illinois. ——— ———, Judge of the United States District Court for the Southern District of Indiana.

[fol. 196] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SPECIAL FINDINGS OF FACT—Filed June 4, 1942

Pursuant to Rule 52 of the Rules of Civil Procedure, the court now states its Special Findings of Fact, as follows:

I

That, on February 4, 1936, the plaintiff, Ziffrin, Incorporated, of Indianapolis, Indiana, filed an application with the Interstate Commerce Commission pursuant to section 209 (a) of the Motor Carrier Act, 1935, for a permit authorizing the continuance of operations as a contract carrier by motor vehicle in interstate commerce or foreign commerce of general commodities from certain designated points in Indiana to points and places in Indiana, Ohio, Kentucky, Illinois, western Iowa, southeastern Wisconsin, West Virginia, to Buffalo, New York, Pittsburgh, Pennsylvania and St. Louis, Missouri, over irregular routes.

II

That this application was referred to a field representative of the Commission to investigate the nature and extent of plaintiff's operations, and, as a result of his report, the Commission, on March 5, 1938, issued a so-called compliance [fol. 197] order authorizing plaintiff to engage in contract carrier transportation by motor vehicle according to specifications set forth therein. This order provided for the filing of protest within thirty days of its entry; such protest was duly filed; the compliance order was vacated pursuant to its terms; and the application was set down for formal hearing before an examiner.

III

That the protest referred to above called the Commission's attention particularly to the relationship of plaintiff to Ziffrin Truck Lines, Inc., a common carrier, disclosed by Commission's Docket No. MC-2510, and alleged that issuance of a permit to plaintiff would violate section 210 of the Motor Carrier Act.

IV

That, accordingly, the notice of hearing on plaintiff's application stated that inquiry would be made into the relationship between plaintiff and Ziffrin Truck Lines, Inc., in the light of the provisions of section 210 of the Motor Carrier Act, 1935. Reference was made to section 5(6) of Part I of the Interstate Commerce Act as then constituted, for the purpose of indicating that the scope of the inquiry would include the question as to control or management in a common interest of the plaintiff and Ziffrin Truck Lines, Inc.

V

That, in due course, plaintiff's application was referred to an examiner. Evidence was fully developed by plaintiff and other parties to the proceeding on the issues raised by the application, the protest and the notice of hearing.

VI

That, after an unfavorable report by the examiner, the case was reviewed by Division 5 of the Commission on plaintiff's exceptions to the examiner's report and on oral argument. On May 29, 1941 the Division issued a report finding

that plaintiff was in operation on July 1, 1935 and continuously since that time as a contract carrier of certain commodities between specified points and destinations. A permit was denied, however, because it was found that [fol. 198] plaintiff and Ziffrin Truck Lines, Inc., the common carrier, were owned, controlled and managed in a common interest, and that under section 210 of the Act the holding of a permit by the plaintiff authorizing contract carrier operations would not be consistent with the public interest and with the national transportation policy. Plaintiff's application for reconsideration was denied by the full Commission on September 29, 1941.

VII

That the complaint in this case was filed on October 21, 1941 and answers were duly filed on behalf of the United States and the Interstate Commerce Commission. Argument was had and the case submitted on final hearing on January 17, 1942. At the hearing plaintiff introduced in evidence a certified copy of the record before the Interstate Commerce Commission, and certain additional evidence designed to show the extent of the damage to plaintiff from the operation of the Commission's order.

VIII

That on the issue under section 210 as to the relationship between Ziffrin Truck Lines, Inc., the common carrier, and plaintiff, the record before the Commission showed that Sam Ziffrin was the president and general manager of both concerns. At the time of the hearing the board of directors, the officers and the sole stockholders of the plaintiff corporation were Sam Ziffrin, Mrs. R. Levi, S. O. Berman, and Lewis Berger. Mrs. Levi is Sam Ziffrin's sister. Apparently she took some part in the corporate affairs; Ziffrin testified that she attended directors' meetings regularly. The position of Berger and Berman was not entirely clear on the record. Ziffrin testified that Berger had not attendad a directors' meeting in over two years, and Berman had attended only one meeting during the year preceding the hearing. The stock of plaintiff corporation consisted of 1,000 shares. Sam Ziffrin owned 495 shares, and his sister, Mrs. Levi, owned 15 shares. Mr. Berman owned 390 shares and Mr. Berger 100 shares. In the common carrier company Sam Ziffrin owned 98 per cent

of the stock, and the remaining 2 per cent was owned by members of his family. The officers, directors and stockholders of that concern were Sam Ziffrin, Esther Ziffrin, his wife, and David and Lewis Ziffrin, his sons. Mrs. [fol. 199] Ziffrin was also assistant treasurer of the plaintiff corporation. Other evidence of close relation between the two companies is to be found in the joint use of equipment and employees, which the record plainly disclosed. Sam Ziffrin represented both the common and contract carriers in their dealings with shippers.

IX

That there was sufficient substantial evidence presented to the Commission to sustain its conclusion and order.

(S.) Sherman Minton—RCB, Judge, United States Circuit Court of Appeals. Robert C. Baltzell, Judge, United States District Court. John P. Barnes, Judge, United States District Court.

Dated this 4" day of June, 1942.

[fol. 200] In United States District Court

Conclusions of Law—Filed June 4, 1942

Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows, to-wit:

I

That the law is with the defendants; that there is substantial evidence to support the order of the defendant, Interstate Commerce Commission, and that the complaint should be dismissed for want of equity.

II

That the defendants should recover of and from the plaintiff their costs herein, taxed at $——.

(S.) Sherman Minton—RCB, Judge, United States Circuit Court of Appeals. Robert C. Baltzell, Judge, United States District Court. John P. Barnes, Judge, United States District Court.

Date this 4 day of June, 1942.

[fols. 201-202] IN UNITED STATES DISTRICT COURT

JUDGMENT ENTRY—June 4, 1942

Upon the foregoing special findings of fact and conclusions of law, it is, ordered, adjudged and decreed:

1. That this cause be and the same is hereby dismissed for want of equity.

2. That the defendants recover of and from the plaintiff their costs, herein taxed at $——.

[fols. 203-204] IN THE DISTRICT COURT OF THE UNITED STATES

[File endorsement omitted]

[Title omitted]

APPLICATION AND MOTION FOR INJUNCTION PENDING APPEAL—Filed June 5, 1942

Comes now plaintiff, Ziffrin, Incorporated, a corporation, and moves the court that an injunction be granted against United States of America and the Interstate Commerce Commission, defendants herein, suspending and restraining the enforcement, operation and execution of and setting aside an order of the Interstate Commerce Commission approved May 29, 1941 entitled Ziffrin, Incorporated Contract Carrier Application No. MC-2511, and restraining said defendants and their law enforcement agents, servants and employees from taking any steps to enforce said order pending the prosecution and determination of an appeal by the plaintiff to the Supreme Court of the United States, the petition for said appeal having been heretofore filed by said plaintiff in this court.

Howell Ellis, John S. Powell, Attorneys for Plaintiff.

[fol. 205] IN THE DISTRICT COURT OF THE UNITED STATES

[File endorsement omitted]

[Title omitted]

NOTICE OF MOTION—Filed June 5, 1942

The defendants, United States of America and Interstate Commerce Commission, and Francis Biddle, attorney general of the United States, and W. P. Bartel, Secretary of the Interstate Commerce Commission, and the intervenors, Regular Common Carrier Conference of American Trucking Associations, Inc., Emmett J. Williams and James E. Williams, Joseph E. Seagram & Son, Inc., Calvert Distilling Company, Louisville Provision Company and Beveridge Paper Company, are, and each of them is hereby notified that at 9:30 A. M. Central War Time on the 10th day of June, 1942 and in the court rooms of the United States District Court for the Southern District of Indiana, Indianapolis Division, situated in the City of Indianapolis, Marion County, State of Indiana, or as soon thereafter as it may be heard, the plaintiff, Ziffrin, Incorporated, will appear by counsel before the Honorable Sherman Minton, Circuit Judge, the Honorable John P. Barnes, District Judge, and the Honorable Robert C. Baltzell, District Judge, who compose the statutory three judge court heretofore assembled to hear and determine the above entitled cause, and then and there and in the above entitled cause will move said court and the judges thereof to grant plain-
[fols. 206-207] tiff an injunction restraining the defendants and each of them from taking or threatening to take any action of any nature whatsoever to enforce the provisions of the order of the Interstate Commerce Commission approved May 29, 1941 entitled Ziffrin, Incorporated Contract Carrier Application No. MC-2511, pending the prosecution and determination of an appeal by Ziffrin, Incorporated, plaintiff, to the Supreme Court of the United States from judgment of said court heretofore entered in this cause on June 4, 1942.

Howell Ellis, John S. Powell, Attorneys for Plaintiff.

[fol. 208] IN THE DISTRICT COURT OF THE UNITED STATES

[File endorsement omitted]

[Title omitted]

NOTICE OF PETITION FOR APPEAL—Filed June 5, 1942

The defendants, United States of America and Interstate Commerce Commission, and Francis Biddle, attorney general of the United States, and W. P. Bartel, Secretary of the Interstate Commerce Commission, and the intervenors, Regular Common Carrier Conference of American Trucking Associations, Inc., Emmett J. Williams and James E. Williams, Joseph E. Seagram & Son, Inc., Calvert Distilling Company, Louisville Provision Company and Beveridge Paper Company, are, and each of them is hereby notified that at 9:30 A. M. Central War Time on the 10th day of June, 1942 and in the courtrooms of the United States District Court for the Southern District of Indiana, Indianapolis, Division, situated in the City of Indianapolis, Marion County, State of Indiana, or as soon thereafter as it may be heard, the plaintiff, Ziffrin, Incorporated, will appear by counsel before the Honorable Sherman Minton, Circuit Judge, the Honorable John P. Barnes, District Judge, and the Honorable Robert C. Baltzell, District Judge, who compose the statutory three judge court heretofore assembled to hear and determine the above entitled cause, and then and there and in the above entitled cause will present to said court its petition for an appeal from the [fols. 209-210] of the United States District Court heretofore entered in this cause on June 4, 1942, the prayer of said petition asking that said appeal be allowed and that plaintiff be granted all other and further relief necessary in the premises.

Howell Ellis, John S. Powell, Attorneys for Plaintiff.

[fol. 211] IN THE DISTRICT COURT OF THE UNITED STATES

[File endorsement omitted]

[Title omitted]

PETITION FOR APPEAL—Filed June 10, 1942

Comes now Ziffrin, Incorporated, plaintiff in the above entitled cause, by its attorneys, and pursuant to Rule 72

of the Rules of Civil Procedure and pursuant to Rule 36 of the Rules of the Supreme Court of the United States, presents, this, its petition for appeal, accompanied by an assignment of errors and a statement as to jurisdiction, which petition seeks an appeal to the Supreme Court of the United States from the judgment of this court heretofore entered in this cause on June 4, 1942, and in support of said petition alleges and says:

I

That on February 4, 1936 the plaintiff, Ziffrin, Incorporated, of Indianapolis, Indiana, filed its application with the Interstate Commerce Commission pursuant to Section 209 (a) of the Motor Carrier Act, 1935, for a permit authorizing it to continue its operations as a contract carrier by motor vehicle in interstate and foreign commerce of general commodities from certain designated points in [fol. 212] Indiana to points and places in Indiana, Ohio, Kentucky, Illinois, western Iowa, Southeastern Wisconsin, West Virginia, to Buffalo, New York, Pittsburgh, Pennsylvania and St. Louis, Missouri over irregular routes.

After proceedings had in accordance with the rules and regulations of the Interstate Commerce Commission, on May 29, 1941 the Interstate Commerce Commission issued its order denying plaintiff's application in toto and requiring plaintiff to cease all of its operations in interstate and foreign commerce, as aforesaid, finding that plaintiff and Ziffrin Truck Lines, Inc., a common carrier, were owned, controlled and managed in a common interest, and that the continued operation of plaintiff and said Ziffrin Truck Lines, Inc. would not be consistent with the public interest and with the national transportation policy in view of the provisions of Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940. Reconsideration of said decision was denied by the Interstate Commerce Commission on September 29, 1941.

II

On October 21, 1941 plaintiff filed in this court its petition for interlocutory and permanent injunctions to vacate and set aside and enjoin the enforcement of said order of the Interstate Commerce Commision dated May 29, 1941 in its Docket No. MC-2511 entitled Ziffrin, Incorporated Contract

Carrier Application. Answers were filed by defendants, and at the hearing on the interlocutory injunction, by agreement of counsel for all parties, the Interstate Commerce Commission agreed to extend the effective date of its order of May 29, 1941 pending the determination of this cause on final hearing, and the last extension of the effective date [fol. 213] under said agreement expired on June 5, 1942. At the time of such agreement further proceedings on the interlocutory injunction were held in abeyance, so that this court has not passed upon the question of the necessity or propriety of the issuance of an interlocutory injunction in this cause.

Hearing on the merits and argument was had and the case submitted on final hearing on January 17, 1942. Briefs were filed by the parties, and on June 4, 1942 this court filed its special findings of fact and conclusions of law in this cause, and entered judgment that this cause be and the same is hereby dismissed for want of equity, which findings of fact, conclusions of law, and judgment are attached hereto, marked Exhibit "A", and made a part hereof by reference.

III

The order of the Interstate Commerce Commission requiring plaintiff to cease all of its operations became effective June 5, 1942, which date was the expiration date of the last extension of the effective date made by said Commission pursuant to the agreement aforesaid, and the judgment of this court was entered on June 4, 1942, one day before the time plaintiff was required to cease all of its operations in interstate and foreign commerce.

IV

On June 5, 1942, plaintiff deposited with the United States Marshal for service on the defendants, notice that on the 10th day of June, 1942, in the court rooms of the United States District Court for the Southern District of Indiana, Indianapolis Division, situated in the City of Indianapolis, Marion County, State of Indiana, or as soon thereafter as it may be heard, plaintiff would appear by counsel and then and there in the above entitled cause would present to this [fol. 214] court its petition for an appeal from the judgment of this court heretofore entered in this cause on June 4, 1942.

V

Attached hereto and accompanying this petition is an Assignment Of Errors in accordance with Rules 9 and 46 of the Rules of the Supreme Court of the United States.

VI

Attached hereto and accompanying this petition is a statement as to jurisdiction in accordance with Rules 12 and 42 of the Rules of the Supreme Court of the United States.

VII

Plaintiff now offers to give proper security for costs and good and sufficient security for a supersedeas and stay of execution or of other proceedings under the judgment or decree pending such appeal, conditioned with good and sufficient security that the plaintiff shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good, all as provided in Rule No. 36 of the Rules of the Supreme Court of the United States, said security to be in the amount or amounts fixed by this court.

Wherefore, your petitioner, Ziffrin, Incorporated, plaintiff in the above entitled cause, respectfully prays that this court, or a judge thereof, allow this appeal, sign the requisite citation and fix the amount of requisite security therefor, and grant to your petitioner all other and further relief necessary and proper in the premises.

Ziffrin, Incorporated, by Sam Ziffrin, President.
Howell Ellis, John S. Powell, Attorneys for Plaintiff.

[fol. 215] *Duly sworn to by Sam Ziffrin. Jurat omitted in printing.*

[fols. 216-222] EXHIBIT "A"—JUDGMENT, SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Omitted, Printed side pages 196-201, ante.

[fol. 223] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 10, 1942

The United States District Court for the Southern District of Indiana erred:

1. In dismissing this cause for want of equity;

2. In determining and ruling, and in stating as its conclusions of law and as the basis of its judgment herein, the following:

a. That the law is with the defendant;

b. That there is substantial evidence to support the order of the defendant Interstate Commerce Commission; and

c. That the complaint should be dismissed for want of equity;

3. In applying Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940, to both a record made and facts existing prior to that date by determining and finding and stating as its special finding of fact No. VIII, and as one of the bases of its judgment herein that under Section 210 as to the relationship between Ziffrin [fols. 224-237] Truck Lines, Inc., the common carrier, and plaintiff, the record showed certain relationships.

4. In determining and finding and stating as its special finding of fact No. IX and as one of the bases of its judgment herein that there was sufficient substantial evidence presented to the Commission to sustain its conclusion and order which include findings that:

a. The holding of a permit by the plaintiff authorizing contract carrier operations would not be consistent with the public interest and with the national transportation policy;

b. That Ziffrin, Incorporated, plaintiff, was not entitled to operating rights as to territory and commodities as

stated in its application to the Interstate Commerce Commission, as amended.

Wherefore, Ziffrin, Incorporated, plaintiff, prays that the judgment be reversed.

Howell Ellis, John S. Powell, Attorneys for Ziffrin, Incorporated.

[fol. 238] In United States District Court

Order Allowing Appeal—June 10, 1942

Ziffrin, Incorporated, a corporation, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered June 4, 1942, and having also filed its Assignment of Errors and its statement of jurisdiction, and having in all respects conformed to the statutes and rules of the court in such case made and provided,

It is ordered and decreed that the appeal be and it is hereby allowed as prayed.

[fol. 239] In United States District Court

Order Fixing Cost Bond—June 10, 1942

It is ordered by the Court that the cost bond on appeal be and the same is hereby fixed at Two Hundred and Fifty Dollars ($250.00).

[fols. 240-241] Citation in usual form, filed June 10, 1942, omitted in printing.

[fol. 242] [File endorsement omitted]

In the District Court of the United States

[Title omitted]

Motion to Transmit Original Record—Filed June 12, 1942

Comes now Ziffrin, Incorporated, plaintiff in the above entitled cause, and conformably with Section 210 of the

Judicial Code, (U. S. C. Title 28, Sec. 47a) and moves the court to direct that the original record instead of a transcript thereof be transmitted to the Supreme Court of the United States in the appeal to that court heretofore allowed.

Howell Ellis, John S. Powell, Attorneys for Ziffrin, Incorporated.

[fols. 243-244] In United States District Court

Order Directing Transmittal of Original Record—June 10, 1942

This cause coming on to be heard on the motion of Ziffrin, Incorporated, a corporation, plaintiff in the above entitled cause, and the court being fully advised in the premises, it is

Ordered and Directed that the original record herein instead of a copy thereof be transmitted to the Supreme Court of the United States on plaintiff's appeal this day granted herein, in accordance with the authority of Section 210 of the Judicial Code.

[fol. 245] [File endorsement omitted]

In the District Court of the United States

[Title omitted]

Petition for Injunction Pending Appeal—Filed June 10, 1942

To the Honorable Sherman Minton, Circuit Judge, and the Honorables Robert C. Baltzell and John P. Barnes, District Judges:

Your petitioner, Ziffrin, Incorporated, an Indiana corporation, respectfully represents: that it is the petitioner in the above entitled cause;

That it is engaged in the business of transporting in interstate commerce property and commodities by motor vehicle as a contract carrier as set forth in its petition for injunction heretofore filed herein;

That your petitioner does a gross business of more than $500,000.00 per year, and employes in its business approximately One hundred and thirty employees, and that the value of your petitioner's business is not less than $500,000.00;

That the order of the Interstate Commerce Commission in its cause No. MC 2511 entitled Ziffrin, Incorporated Contract Carrier Application, which was approved on May 29, 1941 and which was the subject matter of the action in this cause, became effective on June 5, 1942;

[fol. 246] That on June 4, 1942 this court entered its order dismissing this cause;

That if both said order of the Interstate Commerce Commission and the judgment heretofore entered in this cause are permitted to remain effective, this petitioner must completely abandon its service to the shippers served by it and dismantle its equipment and lose its revenue, thereby rendering the business of your petitioner valueless and its equipment will have only junk or salvage value;

That your petitioner is informed and believes that substantial questions of law and fact are involved in the above entitled cause, which questions ought to be determined by the Supreme Court of the United States;

That your petitioner has this day prayed an appeal to said Supreme Court of the United States under the applicable statutes, and that said appeal has been allowed;

That your petitioner expects to prosecute said appeal with diligence, and that your petitioner believes it to be just and equitable that the business and effects of your petitioner be preserved in statu quo during the pendency of its said appeal;

That your petitioner is now engaged in the transportation of certain vital war materials necessary to the national defense, the exact nature of which your petitioner is not permitted to disclose, the interruption of such transportation having already caused, as your petitioner is informed and verily believes, a serious interruption in the manufacture of certain vital war materials;

That should said order be enforced, which became effective June 5, 1942, and your petitioner be required to cease [fol. 247] and desist from its operations for a considerable length of time, and should the said Supreme Court of the United States reverse the decree of this Honorable Court, a grave injustice would result to your petitioner because it

would then be impossible to reassemble its business and reclaim its valuable assets.

Wherefore, your petitioner prays that an order of this Honorable Court be entered herein, enjoining and restraining the defendants, the United States of America and the Interstate Commerce Commission, and their agents, servants, employees, attorneys and officers, from enforcing or attempting to enforce the order entered by said Interstate Commerce Commission on May 29, 1941 in its cause No. MC 2511 entitled Ziffrin, Incorporated Contract Carrier Application, denying to your petitioner a permit to operate as prayed in said cause, until the final disposition by the Supreme Court of the United States of the appeal of your petitioner heretofore allowed herein, and until the further order of this Honorable Court.

And your petitioner will every pray, etc.

Ziffrin, Incorporated, a corporation. By Sam Ziffrin, President.

[fol. 248] *Duly sworn to by Sam Ziffrin. Jurat omitted in printing.*

[fols. 249-250] In United States District Court

Injunction Pending Appeal—June 10, 1942

This cause coming on to be heard in open court, and the court having read and considered the varified petition heretofore filed this day herein, for an injunction pending an appeal,

And it appearing to the court that said petitioner has heretofore filed herein its petition for appeal to the Supreme Court of the United States from the final decree of this court herein, and that by the order of this court said appeal has been allowed, and it further appearing to the court that the defendants, United States of America and Interstate Commerce Commission, offered nothing in opposition to the granting of an injunction pending appeal,

And the court having heard argument of counsel and being fully advised in the premises,

It is Ordered, Adjudged and Decreed, that the defendants, United States of America and the Interstate Com-

merce Commission, their agents, servants, employees, attorneys and officers, be and they are hereby enjoined and restrained from enforcing or attempting to enforce in any manner the order entered by said Interstate Commerce Commission on May 29, 1941 in its cause No. MC 2511 entitled Ziffrin, Incorporated Contract Carrier Application, until the final disposition by the Supreme Court of the United States of the appeal of said Ziffrin, Incorporated, a corporation, heretofore allowed herein and until the further order of this court.

[fols. 251-256] Cost Bond on Appeal for $250.00 approved and filed June 11, 1942, omitted in printing.

[fols. 257-261] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

WAIVER OF ALL NOTICES BY ATTORNEY GENERAL OF INDIANA—Filed June 15, 1942

I, George N. Beamer, Attorney General of the State of Indiana, hereby waive any and all notices required by law or otherwise to be served upon me as Attorney General of the State of Indiana in the above entitled cause, or in any appeal taken therefrom.

George N. Beamer, Attorney General of the State of Indiana.

Dated at Indianapolis, Indiana this 4th day of June, 1942.

[fol. 262] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Statement of Evidence—Filed June 15, 1942

[fol. 263] Be It Remembered, That in the District Court of the United States for the Southern District of Indiana,

Indianapolis Division, at the United States Court House, in the City of Indianapolis, Indiana, on Saturday, January 17, 1942, commencing at ten o'clock in the forenoon, the above-entitled cause came on for hearing before the Honorable Sherman Minton, United States Circuit Judge in and for the Seventh Judicial Circuit, the Honorable John P. Barnes, United States District Judge in and for the Northern District of Illinois, and the Honorable Robert C. Baltzell, United States District Judge in and for the Southern District of Indiana, and the proceedings upon the hearing were in the words and figures following, to-wit:

APPEARANCES:

The Plaintiff appeared by Howell Ellis, Esq., and John S. Powell, Esq., its attorneys.

The Defendant, United States of America, appeared by S. R. Brittingham, Jr., Esq., Special Assistant to the Attorney General of the United States, and by Paul A. Pfister, Esq., Assistant United States District Attorney in and [fol. 264] for the Southern District of Indiana.

The Defendant, Interstate Commerce Commission, appeared by Daniel H. Kunkel, Esq., Attorney for the Interstate Commerce Commission.

The Intervenors, Joseph E. Seagram & Sons, Inc., and Calvert Distilling Company, of Louisville, Kentucky, appeared by T. Milledge Galphin, Esq., Louisville, Kentucky, their attorney.

The Intervenors, Emmett J. Williams and James E. Williams and all others similarly situated, appeared by Russell J. Dean, Esq., Indianapolis, Indiana, their attorney.

The Intervenor, Regular Common Carrier Conference of American Trucking Association, appeared by B. W. La Tourette, Esq., and Gregory M. Rebman, Esq., St. Louis, Missouri, its attorneys.

The Intervenor, The Beveridge Paper Company, appeared by Lou A. Robertson, Esq., Indianapolis, Indiana, its attorney.

[fol. 265] COLLOQUY BETWEEN COURT AND COUNSEL

Judge Minton: Call the case, please, Mr. Clerk.

The Clerk: Ziffrin, Incorporated, against United States of America and Interstate Commerce Commission, No. 448, Civil.

Judge Minton: You may proceed, gentlemen.

Mr. Robertson: If the Court please, The Beveridge Paper Company has a contract with Ziffrin, Incorporated, and is interested on the side of the plaintiff.

I would like to file a petition on behalf of The Beveridge Paper Company for leave to intervene. It has simply the same cause of action as the plaintiff.

Judge Minton: It may be filed.

Mr. Robertson: Thank you.

Mr. Ellis: May it please the Court, before proceeding, I would like permission of the Court to introduce Mr. Bernard La Tourette, an attorney of St. Louis, Missouri, who represents intervenors on the other side of this case. He was represented at the first hearing by his assistant, Mr. Rebman, who is also here, but this is the first time Mr. La Tourette has been present in court.

This case is an action by Ziffrin, Incorporated, an In-
[fol. 266] diana incorporation operating as a contract carrier in interstate and foreign commerce, seeking to set aside a certain order of the Interstate Commerce Commission which, if permitted to become effective, would cause the company to cease business entirely, and also seeks a permanent injunction against certain law-enforcing officials and the Commission against the enforcement of the order. This order, as I have stated, if permitted to become effective, would cause the plaintiff to cease all of its business which has been in existence since 1933.

The order had a certain effective date and, at the time of a partial hearing on interlocutory injunction before this Court, there was an arrangement made for the extension of the effective date and that effective date has been further extended, as I understand, to March 5th because of circumstances which prevented the hearing of this case on its merits at the time originally set.

At the time of the interlocutory partial hearing, the Court requested that we file a brief or memorandum immediately thereafter, indicating the nature of the evidence which we
[fol. 267] proposed to submit at the final hearing and our authority therefore. That has been done by the plaintiff and there have been certain answers or replies filed by other parties.

It is our intention to proceed, when the Court is ready, with the introduction of evidence in line with that outlined in the memorandum which we have filed with the Court.

We are ready to proceed.

Judge Minton: Have you anything to say, Mr. Kunkel?

Mr. Kunkel: If the Court please, the United States and the Commission desire to object to the introduction of any additional testimony in this case.

The only possible ground for the introduction of new testimony in a case of this kind is where a constitutional question of confiscation is involved, and it is our position in this case that no such question is at issue here.

We desire to file with the Court——

Judge Minton (Interposing:) Well, you find that they have some rights, the grandfather rights. Now, then, to say that this order is to go out of business right now,——

[fol. 268] Mr. Kunkel (Interposing:) This action is essentially an attack on the Commission's denial of their alleged grandfather rights, and the basis of that attack is that the Commission——

Judge Minton (Interposing:) They didn't deny that claim of grandfather rights: they granted it in this order.

Mr. Kunkel: No, sir.

Judge Minton: They found that they would be entitled to that, but they denied that under Section 210.

Mr. Kunkel: That is true, and there is no attack on the validity of the legislation at all. The claim is that the Commission acted unlawfully under a valid statute. Now, we say that that does not properly raise any question of deprivation of property under the Fifth Amendment.

Judge Minton: Suppose the order was arbitrary or unreasonable.

Mr. Kunkel: That is one of the grounds on which they seek to set it aside, but, when the Court passes on that issue, [fol. 269] they must pass upon the record upon which the Commission acted, and that is the only record upon which the Court can find that the Commission acted arbitrarily or capriciously.

I desire to file a memorandum brief in behalf of the United States and the Commission, in which we have attempted to meet all of these points. Of course, we were not advised as to the particular issues that the plaintiffs were going to stress here, but we have endeavored to meet all the issues as they appeared from the pleadings.

I have also here for the convenience of the Court printed copies of the Commission's report in this case.

If the Court please, you will note, in support of our objections to the introduction of additional evidence, the first point in our brief is that there is no true constitutional issue involved in this case.

The only case that the plaintiff cites in support of its right to adduce new testimony is that of the Baltimore & Ohio Railroad Company against the United States, reported in 298 U. S.

[fol. 270] A reading of that case, I think, clearly discloses that the basis for the Court's holding there was that the order attacked was a legislative order, and the right to an independent judicial review with respect to a legislative order goes to the substance of the action, whereas, as to an administrative order that is quasi-judicial in character, the only right to raise the constitutional question under the Fifth Amendment is to determine whether there was procedural due process. If there was no notice and hearing, that is the extent to which the plaintiff can rely on his constitutional rights and, in this case, there is no question but what the plaintiff had full opportunity before the Commission to present its case. In the Baltimore & Ohio case, I think that is clearly set out.

That opinion also quotes from the St. Joseph Stockyards case and the language which it quotes there is to this effect: that, "When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these constitutional limits of [fol. 271] power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. * * * Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Now, that is the extent of the opinion in that case and it relates wholly to legislative action, and that is made more

clear later on in the opinion, when the Court says this: that "If as to the value of property the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they were not made in accordance with [fol. 272] the statutes governing a subordinate agency, no constitutional question arises."

Now, we have cited other cases that hold in effect that same way and we think it is perfectly clear that this is not a character of a case in which they can ask this Court to determine independently the substance of the Commission's action.

The Commission, in the performance of its administrative function in the granting of contract permits, is specifically, under the Act, compelled to consider applications in the light of the prohibition against dual operation. That is a specific provision of those provisions under which permits are granted and, therefore, it was a necessary function of the Commission, upon the record before it, to determine whether or not, in fact, a dual operation existed that was forbidden by the statute, and, if it should determine that such dual operation existed,——

Judge Minton (Interposing): It could just make any kind of an order it wanted to?

Mr. Kunkel: No, your Honor, it had a further duty to perform. Then it had to determine whether the holding [fol. 273] by one person of a certificate as a common carrier and a permit as a contract carrier was consistent with the public interest and with the policy of the Act and, then, if it should find that such holding was consistent, it should nevertheless grant the permit, but, if it found, in its administrative function, that such holding was not consistent with the public interest or the policy of the Act, then it was bound under the statute to deny the application. Now, that is just exactly what the Commission did in this case. Therefore, we say the Commission's finding, that the plaintiff here was under common control and management with the common carrier company, was an administrative determination of fact.

Judge Minton: Why couldn't the Commission, just as reasonably, have granted the permit, as it found evidence that it was warranted in doing so, and then let the parties themselves solve the problem of divorcing the contract carrier and the common carrier?

Mr. Kunkel: The Act forbade it. Let us assume that there was an identity in the two applications. The plain-
[fol. 274] tiff had come to the Commission and had been granted a certificate as a common carrier. Then it comes and asks the Commission for a permit as a contract carrier and the Commission says, "No, the law forbids it." It seems to me that the Commission was acting within its discretion in the matter.

Judge Minton: The situation wasn't quite that simple. There were two corporations here and you had to make a determination as to whether or not there was this relationship.

Mr. Kunkel: Well, of course, that is true, but my supposition was on the basis that they were an individual, a single entity.

Now, the Commission did find that they were owned, operated and controlled by a common head. Having found that, then the Act stepped in to prevent the Commission from granting this contract permit.

Judge Minton: I don't understand that it was prevented from granting the permit. It could have granted the permit and then taken the position that these parties here are related in a manner that is contrary to the public policy as
[fol. 275] declared by Section 210, but given them a certain time in which to unscramble themselves instead of cutting their head off right now, as this order does and the Commission assuming the right to say which one of these corporations shall go out of business.

Mr. Kunkel: It seems to me that they had already exercised their option when they filed for and obtained their certificate as a common carrier.

Judge Minton: That certainly was years ago when they got their permit as a common carrier and probably antedated the Motor Carrier Act.

Mr. Kunkel: Oh, no, sir, it was under the Common Carrier Act that they obtained that.

Judge Minton: They were in business, I mean, before the Common Carrier Act was enacted.

Mr. Kunkel: That is true, but the Common Carrier Act came along and said that one person cannot operate in the two capacities.

Now, in further answer to your Honor's suggestion that the Commission could have granted it and given directions to the company to elect which one they wanted to continue,

[fol. 276] I might say this: that the law is specific. It says that it shall be unlawful for a holder of a certificate and a holder of a permit to be vested in the same person.

Judge Baltzell: They could have given a definite time, could they not, as they had in some other cases?

Mr. Kunkel: They could if the plaintiff would have been willing to suspend all operations. He couldn't continue those operations in both capacities, under the law.

Judge Baltzell: That is what Commissioner Lee dissented from.

Mr. Kunkel: I think that was the basis of his dissent, but my suggestion to the Court is that that was an impossible thing to do. The law is very clear.

Judge Baltzell: He said they did it in another case—Lee——

Mr. Kunkel (Interposing): I think that was his——

Judge Baltzell (Continuing): —the case of New York and New Brunswick.

Mr. Kunkel: But I might suggest to the Court, too, that that is also a matter of administrative discretion.

[fol. 277] Judge Minton: Well, maybe they abused that discretion.

Mr. Kunkel: Oh, yes, you can always abuse your discretion, but I mean that the abuse must be very clear.

Judge Baltzell: Of course, this carrier has now had seven or eight months in which to comply and, as I understand, has made no effort to do so.

Mr. Kunkel: No, as I understand, this plaintiff is insisting on his right, by virtue of the fact of two corporations, to have both of these operations.

I have gotten a little afield in answer to your Honor's questions. My purpose was to make clear the defendants' objections to the introduction of additional testimony that we understand the plaintiff proposes to introduce.

Judge Minton: How long do you think, Mr. Ellis, it will take you to introduce the evidence that you have in mind to introduce?

Mr. Ellis: Your Honor, it will take us a very brief time to introduce the evidence, but I want to remark to the [fol. 278] Court that I propose, with the Court's permission, to argue the merits of this case at what appears to be the proper time.

The counsel for the Commission, as he said, got far afield. We submitted a brief——

Judge Minton (Interposing): That was my fault.

Mr. Ellis: I am not criticizing you, but, as I say, we submitted a brief, following the other hearing, as requested by the Court, for the purpose of letting the Court know immediately what we were proposing to offer in the way of evidence on this hearing, citing our authority for it, and we are ready now to do so.

Judge Minton: Proceed.

Judge Barnes: By "a very brief time," you mean how much time?

Mr. Ellis: I would say from twenty minutes to a half hour.

Judge Minton: Proceed. That is fast enough.

The Plaintiff, to maintain the issues on its behalf, offered and introduced the following evidence, to-wit:

[fol. 279] Mr. Ellis: First, the plaintiff offers in evidence Exhibit 1, Exhibit 2 and Exhibit 3, as marked by the Official Reporter, Exhibit No. 1 being the original Complaint filed in this Court, Exhibit No. 2, a certified copy of the application before the Interstate Commerce Commission, and Exhibit No. 3, a certified copy of the record before the Interstate Commerce Commission and the various orders and papers that are involved.

I offer those exhibits in evidence.

Judge Minton: They may be admitted.

The said original Complaint herein, so offered and admitted in evidence, marked for identification Plaintiff's Exhibit No. 1, the said certified copy of Application before the Interstate Commerce Commission, so offered and admitted in evidence, marked for identification Plaintiff's Exhibit No. 2, and the said certified copy of the record before the Interstate Commerce Commission and the various orders and papers involved, so offered and admitted in evidence, collectively marked for identification Plaintiff's Exhibit No. 3, are in the words and figures following, to-wit:

[fol. 280] Mr. Brittingham: May we ask for an offer of proof on the part of plaintiff, at this time, so that we can register our objection on the record?

Mr. Ellis: Well, I might say that I think the counsel is fully advised. The evidence is going to be in line with that set out in our memorandum. The plaintiff's first

witness is the accountant who examined the books of the plaintiff and who is going to identify an exhibit, being a balance sheet and profit and loss statement for the first eleven months of 1941. That is all he is going to testify about.

Mr. Brittingham: We object to that on the ground——

Mr. Ellis: (Interposing) Well, now, I don't believe he should object before I offer it, may it please the Court.

Mr. Brittingham: Well, I am sorry.

Mr. Ellis: He asked me to tell him what I propose to do and, now, I have done so and it seems to me that objection doesn't lie until I try to do it.

Mr. Kunkel: I desire to object to the offer of the plaintiff on two grounds: that the evidence that he proposes [fol. 281] to introduce at this time is not material to any issue in the case, nor is it even material to his alleged constitutional objection to this order.

Judge Minton: Let the witness be sworn and let's see what you are going to offer.

R. E. Hamilton, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Ellis:

Q. State your name to the Court.

A. R. E. Hamilton, South Bend, Indiana.

Q. Are you a public accountant?

A. Yes, sir.

Q. Do you have an office in your home city?

A. I do.

Q. And do you engage in public accountancy work?

A. I do.

Q. You are not a regular employe of the plaintiff in this case, Ziffrin, Incorporated, are you?

[fol. 282] A. I am not.

Q. Were you employed by us for the purpose of making a study of the books and records of this company and did you make such study and reduce it to writing in the form of a balance sheet and a profit and loss statement for the first eleven months of the year 1941?

A. I did.

Q. Is it true that the books of the company are not closed for the full twelve months' period of 1941?

A. They are not closed.

Q. I hand you a paper which for the purposes of identification has been marked by the reporter as Exhibit No. 4 and ask you if that is the document that you testified that you prepared.

A. That is the document.

Q. Is that document true and correct?

A. Yes, that document is true and correct.

Q. I just want to ask you one question about it. What does it show as to the gross revenue received by this plaintiff from its business during the first eleven months of the year 1941?

A. Four hundred ninety-eight thousand one hundred [fol. 283] thirty-eight dollars eighteen cents ($498,138.18).

Q. What was that figure?

A. Four hundred ninety-eight thousand one hundred thirty-eight dollars eighteen cents ($498,138.18). That is the gross revenue.

Mr. Ellis: We offer in evidence Exhibit No. 4.

Mr. Kunkel: The Government objects to the introduction of this exhibit for the reasons previously stated and asks that this exhibit be rejected and that the testimony of the witness be stricken.

Mr. LaTourette: May the record show, if your Honors please, that the Intervenors join in that objection?

Judge Minton: It may be received, subject to counsel's objection.

The said document, so offered and admitted in evidence, marked for identification Plaintiff's Exhibit No. 4, is in the words and figures following, to-wit:

[fol. 284] Mr. Ellis: You may cross examine.

Mr. Kunkel: No questions.

Judge Barnes: Just a minute. Does this paper show how much this plaintiff made during the first eleven months of last year?

The Witness: Yes, sir.

Judge Barnes: What is the figure?

The Witness: The figure, as you will see if you will look at the last sheet, is twenty-six thousand one hundred forty-seven dollars twelve cents ($26,147.12).

Judge Barnes: That is all.

Witness excused.

Hugh V. Brady, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Mr. Ellis: Does the Court wish me to state the nature of this witness's testimony, as requested by the Government, or shall I proceed?

Judge Minton: Go ahead and offer it and let him make his objection in the orderly way.

[fol. 285] Mr. Ellis: The witness Brady will testify that he is a banker connected with the Security Trust Company at Indianapolis.

Judge Minton: Let the witness be sworn and offer his testimony, Mr. Ellis, and, if counsel wishes to object, let him object.

Mr. Ellis: All right.

Direct examination.

Questions by Mr. Ellis:

Q. State your name.
A. Hugh V. Brady.
Q. Where do you live, sir?
A. In Indianapolis.
Q. What is your business or profession?
A. I am Treasurer of the Security Trust Company.
Q. What is the Security Trust Company?
A. That is a state bank in Indiana.
Q. Located in the city of Indianapolis?
A. Located in the city of Indianapolis.
Q. And what are your duties in connection with that bank?

A. Well, I am the bank manager, that is, the bank man-
[fol. 286] ager and also a member of the Board of Directors, and also a member of the Discount Committee of our bank.

Q. In connection with your duties with the bank, have you had occasion at various times to pass upon the value of business and industrial and transportation concerns?

A. I have.

Q. Does the plaintiff in this case, Ziffrin, Incorporated, maintain an account at your bank?

A. They do.

Q. I want to hand you, sir, a paper identified by the preceding witness as Exhibit 4, which is a balance sheet and profit and loss statement for the first eleven months of the year 1941, of this plaintiff.

Have you been given an opportunity to examine that paper prior to taking the witness stand?

A. I have.

Q. And have you made a study of it?

A. Yes, sir.

Q. As the result of the study of the financial setup of this company and such other investigation as you may have made, are you now prepared, based upon your past [fol. 287] experience in that line of work, to give an opinion as to the present value of the business of the plaintiff, Ziffrin, Incorporated?

A. I am.

Q. State to the Court what, in your opinion, is the present value of Ziffrin, Incorporated.

A. My present opinion of the valuation would be approximately five hundred thousand dollars.

Mr. Ellis: You may cross examine.

Mr. Kunkel: We desire to renew our objection on the same grounds as we stated before to the testimony of this witness: that it is not competent in this proceeding on any issue in the case.

Judge Minton: Proceed, subject to counsel's objection.

Mr. LaTourette: May the record note the objection of the Intervenors also?

Judge Barnes: How did you figure out that value, Mr. Brady?

The Witness: Well, we have earnings here of—this is my approach to it: we have earnings here of twenty-six thousand and a little over for a period of eleven months, [fol. 288] which represents a five percent return on five hundred thousand dollars for a year—it will run more than that—which isn't a bad return in the present scheme of things, including taxes paid here and all, and on a gross income of four hundred and ninety-eight thousand for an eleven months period, having the background in my mind

of profits of this business and maintenance of balances and the general approach to the credit setup.

That is certainly an arbitrary figure and there probably would be a half dozen different answers to your question.

Judge Barnes: That is all.

Mr. Ellis: If there are no further questions, you may step down, sir.

Witness Excused

Sam Ziffrin, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

[fol. 289] Direct examination.

Questions by Mr. Ellis:

Q. State your name to the Court.

A. Sam Ziffrin.

Q. Where do you live, Mr. Ziffrin?

A. Indianapolis.

Q. What connection, if any, do you have with the plaintiff in this case, Ziffrin, Incorporated?

A. I am the President.

Q. Mr. Ziffrin, did you verify the original Complaint which has been marked Exhibit 1 in this case?

A. I did.

Q. Are the allegations contained therein true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. In that Complaint, Mr. Ziffrin, there is a statement to the effect that the present value of the business of Ziffrin, Incorporated, is approximately seven hundred and fifty thousand dollars ($750,000). Was that figure arrived at by you?

A. Yes, sir.

Q. I wish you would explain to the Court the basis for [fol. 290] your estimate of seven hundred and fifty thousand dollars as the present value of the business of Ziffrin, Incorporated?

A. Well, about a year ago I was engaged in a merger known as the Transport Company and the question of valuation was brought up and, taking into consideration the tax dollar, it was a sort of a rule of thumb that about

one and a half times the gross annual income would be a fair valuation after taking into consideration the amount of all taxes that might have to be paid to the Government, and that would leave only probably half of that or less than half net to the seller.

Q. Are we to understand that, taking a basis of approximately five hundred thousand dollar annual revenue, by taking one and a half times that, you arrived at your approximate figure?

A. That is correct.

Q. Mr. Ziffrin, if this order of the Interstate Commerce Commission, complained of in this proceedings, is permitted to become effective, what will be the effect upon the business of Ziffrin, Incorporated?

[fol. 291] A. Well, it will just make for naught the business that has been going since 1933 and put about a hundred and forty people out of work. It would render valueless almost everything that they have outside of a little salvage value of some equipment. It would make for naught all of the investment of the stockholders and it certainly would be impossible for us to fulfill our contracts that we think are strong bilateral contracts. We couldn't make good to our shippers.

It is possible that some of that business might be recaptured, but I doubt it.

Q. What is your opinion as to what effect this order, if permitted to become effective, will have upon the value of the stock of Ziffrin, Incorporated?

A. It would just render it worthless.

Q. Is a large part or a large share of the stock of the plaintiff, Ziffrin, Incorporated, owned by stockholders who are not stockholders in the company known as Ziffrin Truck Lines, Incorporated, and who are not related to you in any way, shape or form?

A. Yes, sir.

Mr. Ellis: You may cross examine.

[fol. 292] Mr. Kunkel: For the record, may it be stated that we object to this witness's testimony and ask that it be stricken?

Judge Minton: It will be received, subject to counsel's objection.

Mr. Ellis: Any other questions?

Mr. Kunkel: No.

Mr. Ellis: Unless there are further questions now, you may step down, Mr. Ziffrin.

Witness excused.

Mr. Ellis: The plaintiff rests.

And the plaintiff here rested.

Mr. Kunkel: The defendants have nothing to offer.

And the defendants here rested.

Mr. LaTourette: The Intervenors have no testimony.

And the intervenors here rested.

And this was all the evidence given upon the hearing.

[fol. 293] Judge Minton: Anything further? Do you want to argue it now?

Mr. Ellis: I would like very much to present an argument to the Court at this time, if that will be permitted.

We also want to request permission for time in which to file a brief in this matter, but we are prepared to present argument at this time.

Mr. Kunkel: May I suggest to the Court, in view of the fact that this case has been delayed, through no fault of counsel for plaintiff, that there certainly has been opportunity for counsel for the plaintiff to give the Court the benefit of its views in the form of a brief. I do not want to preclude Mr. Ellis from the opportunity of filing a brief, but I think the Court should limit the time in which he should be permitted to file to a rather short period.

Mr. Ellis: Well, I want to inform the Court and the distinguished counsel for the defendants that we have not been negligent during this time and have our brief virtually prepared, but I want to include some remarks about the evidence and I do not believe that a brief can properly [fol. 294] be completed until the case has been closed. We are not going to ask any unreasonable time.

Judge Minton: How much time do you want now?

Mr. Ellis: Well, may it please the Court, I would like to have considerable time. I realize the situation here, it being Saturday, and that the Court is busy, but I would like such time as the Court feels it has at its disposal to give me, and I will attempt, then, to put my argument into that space of time. If I were to make the argument that

I had prepared, I would want an hour and a half or two hours.

Judge Minton: You are not going to make that argument.

Mr. Ellis: I was fearful of that, your Honor.

Judge Minton: How about thirty minutes?

Mr. Ellis: I will attempt, in that time, simply to go over the points that we have in mind and, then, it will be elaborated on in the brief.

Judge Minton: Proceed.

The arguments of counsel for the respective parties having been presented, the Court thereupon adjourned.

[fol. 295] PLAINTIFF'S EXHIBIT No. 2

Secretary's Certificate to Exhibit omitted in printing.

(Here follows 4 photolithographs, side folios 296-299)

Form B. M. C. 3

PROPERTY CARRIER APPLICATION

(Under "Grandfather" Clause)

This form for use only by Common Carriers engaged in transportation of property in interstate or foreign commerce on June 1, 1935 and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter)

(Before answering, read General Instructions on last page. Numbers under line refer to Special Instructions on that page)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of Ziffrin, Incorporated (Full and correct name) for a Permit (Certificate or permit) to operate as a Contract Carrier (Common carrier or contract carrier) of property, under the Motor Carrier Act, 1935.

Docket No. MC-2511 (Do not fill in)

APPLICATION

To the Interstate Commerce Commission, Washington, D. C.

APPLICANT STATES:

That full and correct name of applicant is Ziffrin, Incorporated

Business address 1231 West Morris St., (Street and number) Indianapolis (City)

Marion (County) Indiana (State)

That applicant is a Corporation (1), doing business under the trade name or style of Ziffrin, Incorporated

That applicant, if a corporation, was organized under the laws of the State of Indiana; and that, if a partnership, the names and addresses of the partners are as follows:

Name	State, City and Street Address

INTERSTATE COMMERCE COMMISSION RECEIVED FEB 4 - 1936

If an association, describe clearly its character

That the type of service furnished and the operations conducted by the applicant (or predecessor in interest) on July 1, 1935 (2), were as shown in EXHIBIT A, and that no change has occurred therein since that date, except as shown in that exhibit.

That applicant submits as evidence in support of statements contained in EXHIBIT A, the information contained in EXHIBIT B.

That applicant will submit such additional information to substantiate the applicant's prayer herein as the Commission may require.

That applicant has complied with the order of the Commission relative to the service of application on interested parties as shown in EXHIBIT C.

WHEREFORE, The applicant herein prays: That the Commission issue a Permit (Certificate or permit) to operate as a Contract Carrier (Common carrier or contract carrier) of Commodities Generally (State whether commodities generally, with certain exceptions, or special commodities only);

and applicant further prays that if the facts herein contained show that applicant, although applying for a Permit

Name

INTERSTATE COMMERCE COMMISSION
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If an association, describe clearly its character .....

That the type of service furnished and the operations conducted by the applicant (or predecessor in interest) on July 1, 1935, were as shown in EXHIBIT A, and that no change has occurred therein since that date, except as shown in that exhibit.

That applicant submits as evidence in support of statements contained in EXHIBIT A, the information contained in EXHIBIT B.

That applicant will submit such additional information to substantiate the applicant's prayer herein as the Commission may require.

That applicant has complied with the order of the Commission relative to the service of application on interested parties as shown in EXHIBIT C.

WHEREFORE, The applicant herein prays: That the Commission issue a Permit (Certificate or permit) to operate as a Contract Carrier (Common carrier or contract carrier) of Commodities Generally (State whether commodities generally, with certain exceptions, or special commodities only);

and applicant further prays that if the facts herein contained show that applicant, although applying for a Permit (Certificate) (Permit), is entitled to a Certificate (Permit) (Certificate), this application be considered to be one for the appropriate form of authority.

Dated this 29 day of January, 1936

ZIFFRIN, INCORPORATED (Applicant)

By Sam Ziffrin (Title) President

OATH

STATE OF Indiana
COUNTY OF Marion } ss:

Sam Ziffrin (Name of affiant) makes oath and says that he is the President (Title of affiant) of the Ziffrin, Incorporated (Name of applicant); that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached thereto; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Sam Ziffrin

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this 29th day of January, 1936.

(SEAL)

Julia B. Spitzer

My commission expires January 3, 1939

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16—1414

94A

Form B, M. C. C. 1.

EXHIBIT A

Ziffrin, Incorporated
(Name of applicant)

Except as otherwise noted, the following information is to be as of June 1, 1935, if application is for a Certificate; and as of July 1, 1935, if application is for a Permit. However, this instruction is not intended to confine all answers of applicant strictly to such dates. The information given should, where necessary, cover a sufficient period prior to such dates to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the Certificate or Permit sought under the "Grandfather" clause.

TYPE OF SERVICE AND ROUTES AND TERRITORY SERVED

I. Type of service:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interstate or foreign commerce, property, consisting of (1) commodities generally, except Commodities Generally (Indicate exceptions, either specifically or by their general nature), or

~~(2) the following described commodities only~~ (Indicate class or classes of commodities transported) (Strike out (1) or (2), whichever is inapplicable to applicant's business.)

B. Applicant (or predecessor) undertook to transport property for the general public for hire Yes (Yes) No (No). If answer is "No", state for whom applicant (or predecessor) transported under special contracts or agreements:

Name	City and street address	Written or verbal
Old Quaker Distilleries	Lawrenceberg, Indiana	Written
Joseph E. Seagram & Sons	Lawrenceberg, Indiana	Written
Merchants Distilling Company	Terre Haute, Indiana	Written
Kennedy Car Liner & Bag Co.	Shelbyville, Indiana	Written
Bemis Bag Company	Indianapolis, Indiana	Written
Standard Oil Company	Hammond, Indiana	Written

C. Applicant has continued to operate as above stated without any change in the type or extent of service and is now so operating Yes (Yes) ..... (No). If the answer is "No", state in detail character and extent of such change:

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D. If service was not rendered on or has been interrupted since statutory date, give facts and reasons briefly but in detail:

No Interruptions

II. Description of each route regularly operated on July (1) 1, 1935: (All irregular operations)

A. By applicant (or predecessor in interest) in own right:

1. Between ..... and ..... (Indicate furthermost points on route), as follows:

(a) From ..... to ..... via Highway ..... (Indicate furthermost points under each highway number) (Use U. S. highway number when one applicable; otherwise, State or county highway number)

Standard Oil Company Hammond, Indiana Written

C. Applicant has continued to operate as above stated without any change in the type or extent of service and is now so operating Yes (Yes) (No) If the answer is "No", state in detail character and extent of such change

INTERSTATE COMMERCE COMMISSION RECEIVED FEB 4 - 1936 2511

D. If service was not rendered on or has been interrupted since statutory date, give facts and reasons briefly but in detail

No Interruptions

II. Description of each route regularly operated on July (3) 1, 1935: (All irregular operations)

A. By applicant (or predecessor in interest) in own right:

1. Between and (Indicate furthermost points on route), as follows:

(a) From to (Indicate furthermost points under each highway number), via Highway (Use U. S. highway number wherever applicable; otherwise, State or county highway number)

(b) From to , via Highway

(c) From to , via Highway

(d) From to , via Highway

(e) From to , via Highway

(Repeat as above for each route and part thereof See example in Note 3 on last page. Indicate in each case whether return routes correspond to those above described If not, furnish similar description for return route Furnish map showing each route.)

Show also, for each route separately:

(1) Whether all intermediate points were served Yes (Yes) (No); if not, indicate exceptions:

(2) The off-route points served (4)

(3) Character of traffic (that is, commodities generally, with certain exceptions; special commodities, etc.)

Commodities Generally (Specify exceptions, or special commodities)

(4) Frequency of service (where interval between schedules was more than a day)

(5) Points at which traffic was interchanged, with whom interchanged, and the arrangement under which interchange was effected, including whether or not through rates were used

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Form B. M. C. 1

EXHIBIT A. CONTINUED

B. Has applicant acquired or instituted a route or routes since July (2) 1, 1935? ..... (Yes) No (No) If so, attach statement (designated as II-B), giving, for each such route, the information requested in (A) above and name and address of predecessor, if any. Attach copy of purchase agreement, State certificate or permit, or other documents evidencing acquisition or institution of each such route or routes.

C. Does applicant herein apply for rights over any route or routes operated by others under agreement? ..... (Yes) No (No) If so, attach statement (designated as II-C), giving, for each such route, the information requested in (A) above and name and address of operator. Attach copy of lease or operating agreement.

D. Does applicant operate over any route or routes under a lease or operating agreement? ..... (Yes) No (No) If so, attach statement (designated as II-D), giving, for each such route, the information requested in (A) above and name and address of the other party to such lease or agreement. Attach copy of such lease or agreement.

E. Has applicant abandoned or otherwise disposed of any route or routes since July (2) 1, 1935? ..... (Yes) No (No) If so, attach statement (designated as II-E), giving, for each such route, the information requested in (A) above, the manner and date of disposition, and name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal.

F. Were operations on any of the above routes or parts of routes begun since January 1, 1935? ..... (Yes) No (No) If so, give the date on which operations commenced .....

Were operations on any of the above routes or parts of routes seasonal? ..... (Yes) No (No) If so, attach statement (designated II-G), giving the facts clearly and in detail, showing applicant's customary operation, including months of normal operating

tion of operations over irregular routes on July (3) 1, 1935:

Location of applicant's headquarters 1231 West Morris Street, Indianapolis, Ind.

Where did applicant obtain the main volume of its traffic? If a place or places, name them; if a territory, describe it fully

Indianapolis, Indiana - Terre Haute, Indiana - Shelbyville, Indiana - Hammond, Indiana - Lawrenceberg, Indiana.

G. To what principal place, places or territory did applicant transport such traffic? Answer as in (B) .....

Indiana, Ohio, Buffalo New York, Pittsburg Pennsylvania, Kentucky St. Louis Missouri, Illinois, Western Iowa, South Eastern Wisconsin, West Virginia, all as indicated on the map attached hereto.

H. If answers to the above questions do not adequately and completely describe applicant's operations on July (2) 1, 1935, describe operations clearly and in detail This operation is pretty much whisky and paper and is dependent upon the output of distilleries and routing orders and is usually carried in truck load lots.

operations over irregular routes on ..... (2) ....., 1935:

Location of applicant's headquarters 1231 West Morris Street, Indianapolis, Ind.

Where did applicant obtain the main volume of its traffic? If a place or places, name them; if a territory, describe it fully

Indianapolis, Indiana - Terre Haute, Indiana - Shelbyville, Indiana - Hammond, Indiana - Lawrenceberg, Indiana.

C. To what principal place, places or territory did applicant transport such traffic? Answer as in (B)

Indiana, Ohio, Buffalo New York, Pittsburg Pennsylvania, Kentucky St. Louis Missouri, Illinois, Western Iowa, South Eastern Wisconsin, West Virginia, all as indicated on the map attached hereto.

D. If answers to the above questions do not adequately and completely describe applicant's operations on July (2) 1, 1935, describe operations clearly and in detail This operation is pretty much whisky and paper and is dependent upon the output of distilleries and routing orders and is usually carried in truck load lots.

E. Have there been any changes in the nature or extent of applicant's irregular route operations between July (2) 1935, and date of this application? ..... (Yes) No (No) If so, describe the changes in detail .....

IV. A. Number of vehicles in revenue service on July (2) 1, 1935

Trucks ....., Tractors 26, Semitrailers 26, 2-wheel trailers ....., 4-wheel trailers .....

Total owned by applicant 4; total leased to applicant 48 Number of vehicles leased by applicant to others .....

B. Number of vehicles in revenue service on date of this application:

Trucks ....., Tractors 26, Semitrailers 26, 2-wheel trailers ....., 4-wheel trailers .....

Total owned by applicant 4; total leased to applicant 48 Number of vehicles leased by applicant to others .....

12 1414

DFG

Form M. C. 1.

EXHIBIT B

Ziffrin, Incorporated
(Name of applicant)

EVIDENCE OF OPERATION

I. Applicant as a common carrier on June 1, 1935, or a contract carrier on July 1, 1935, submits the following evidence as proof of his operations:

A. Certified copy of any order of any State authorizing applicant's or predecessor's operations and of any order authorizing transfer of such authority to applicant. (Attach and identify as statement B-I-A.)

See Exhibit B-I-A attached hereto.

B. That applicant or a predecessor was registered under a Code of Fair Competition as follows:

REGISTRANT (If predecessor, give name)	Name of code	Date or dates of registration
Ziffrin, Incorporated	National Code for the Trucking Industry #278 - - - State Code Authority for the Trucking Industry for the State of Indiana	1934

See also, Exhibit B-I-B attached hereto.

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C. Any other proof deemed necessary by applicant, such as affidavits, bills of lading, route schedules, port of entry receipts, etc. (Attach and identify as statement B-I-C.)

See Exhibit B-I-C-1: Statement by applicant as to the length of time it has been operating.

See Exhibit B-I-C-2: Letters from various shippers and receivers of freight showing that applicant in the past and prior to July 1, 1935, did serve such parties.

See Exhibit B-I-C-3: Miscellaneous proof of operation.

Applicant prays the Commission to consider applicant's records, books and accounts as hereby incorporated by reference and made a part of this application for such further proof as the Commission may require.

the State of Indiana.

INTERSTATE COMMERCE COMMISSION
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See also, Exhibit B-I-B attached hereto.

C. Any other proof deemed necessary by applicant, such as affidavits, bills of lading, route schedules, port of entry receipts, etc. (Attach and identify as statement B-I-C.)

See Exhibit B-I-C-1: Statement by applicant as to the length of time it has been operating.

See Exhibit B-I-C-2: Letters from various shippers and receivers of freight showing that applicant in the past and prior to July 1, 1935, did serve such parties.

See Exhibit B-I-C-3: Miscellaneous proof of operation.

Applicant prays the Commission to consider applicant's records, books and accounts as hereby incorporated by reference and made a part of this application for such further proof as the Commission may require.

EXHIBIT C

CERTIFICATE OF SERVICE

I, Sam Ziffrin (Name of affiant), President (Title of affiant) of the applicant, do hereby certify that upon the 31st day of January, 1936 I served the foregoing application upon the Boards, Commissions, or officials (or the Governor where there is no Board, Commission, or official) of the States of ...., in which States applicant operates, by delivering in person (or mailing by registered mail) a true, correct, and complete copy of this application to each thereof at the following addresses:

(Name of Board, etc.) (Address)

See Exhibit C, attached hereto

ZIFFRIN INCORPORATED

BY Sam Ziffrin (Signature)

President

940

[fol. 300] [Stamp:] Interstate Commerce Commission, Received Feb. 4, 1936.

EXHIBIT C

Certificate of Service

I, Sam Ziffrin, President of the applicant, do hereby certify that upon the 31st day of January, 1936, I served the foregoing application upon the Boards, Commissions, or officials (or the Governor where there is no Board, Commission, or Official) of the States of Indiana, Illinois, Ohio, Pennsylvania, New York, Iowa, Kentucky, Missouri, Wisconsin and West Virginia, in which States applicant operates, by delivering by registered mail a true, correct, and complete copy of this application to each thereof at the following addresses:

Public Service Commission of Indiana, Indianapolis, Indiana.
Illinois Commerce Commission, Springfield, Illinois.
Public Utilities Commission, Columbus, Ohio.
Public Service Commission, Harrisburg, Pennsylvania.
Public Service Commission, Albany, New York.
Board of Railroad Commissioners, Des Moines, Iowa.
Public Service Commission, Frankfort, Kentucky
Public Service Commission, Jefferson City, Missouri.
Public Service Commission, Madison, Wisconsin.
Public Service Commission, Charleston, West Virginia.

Ziffrin, Incorporated, by Sam Ziffrin, President, Applicant.

(Here follows 1 photolithograph, side folio 301)

STATE OF INDIANA

PUBLIC SERVICE COMMISSION

ON FILE

IN THE MATTER OF THE PETITION OF IFFRIG INC FOR A PERMIT TO OPERATE MOTOR VEHICLES AS A CONTRACT CARRIER OF PROPERTY OVER THE HIGHWAYS OF THE STATE

No. 607 C

APPROVED Dec 31 1934

Appearances: For Petitioner — Joseph Weiss Atty, Indianapolis Indiana

For Protestants — L B Manning, Atty, Indianapolis, Indiana
L. J & L. T P Co
Mich Central R R Co
C I. & L. R R Co
N. Y. C R R Co
Grand Trunk R R Co
N. Y C. & St. L. R.R Co
C & E I R R Co
Wabash R R Co
Penn R R. Co
C & O R R Co
Hyde R R Co
P. M. R R Co
B & O R R Co
I. C R R Co
L & N R.R Co

F. D Merriel, Anderson, Indiana, Ind R R System, Ilinois R R Co, Ind Service Corporation, Northern Ind R.R Co, C. S. S & S. R R. Co, P. S Co. of Ind

Mills & Gunthar, Indianapolis, Indiana, Lecchin Motor Express

Riley Shields, For C. H. I. & I. Motor Freight

By the Commission
Eric O. Hitz 1939

On the 31st day of July 1933, Iffrig, Inc, of 1231 East Morris St, Indianapolis Indiana filed with the Public Service Commission a petition to operate motor vehicles as a contract carrier of property, both Interstate and Intrastate over and upon the following route:

Route 1 Cities and towns over public highways of State of Indiana.

Said petition was verified and submitted on the contract carrier motor vehicle form No 11 prescribed by the Commission. This matter was set for hearing at the Room of the Commission, State House, Indianapolis, Indiana, at 9.00 A M Oct 26th 1933 and legal notice of the time and place of said hearing was given by the Commission by publication on the 10th day of Oct 1933 in the Indianapolis Times and the India apolis Star being two newspapers of general circulation published and printed in the City of Indianapolis Marion County, Indiana, and further notice of the time and place of said hearing was given by the Commission in accordance with the provisions of Section 6, Chapter 70 of the Acts of the General Assembly 1933

This cause coming on for hearing in its regular order at the time and place named in the notice is now submitted to the Commission for hearing, finding and order

And the Commission having heard the evidence and being duly advised in the premises finds:

That petitioner now has contracts covering the transportation of property over the above route with the following contractors, to-wit

1. Calumet Breweries Inc.
2. Northern Distributors Inc
3. State Brewing Co
4. Hoosier Brewer.es Inc
5. Mid West Beverage Co Inc
6. H. V. B. Corporation
7. Handy Beverage Co Inc

2511

INTERSTATE COMMERCE COMMISSION RECEIVED FEB 4 - 1936

Commission a petition to operate motor vehicles as a contract carrier of property, both Interstate and Intrastate over and upon the following route:

Route 1 Cities and towns over public highways of State of Indiana.

Said petition was verified and submitted on the contract carrier motor vehicle form No 11 prescribed by the Commission. This matter was set for hearing at the Rooms of the Commission, State House, Indianapolis, Indiana, at 9.00 A M Oct 26th 1935 and legal notice of the time and place of said hearing was given by the Commission by publication on the 10th day of Oct 1935 in the Indianapolis Times and the India apolis Star being two newspapers of general circulation published and printed in the City of Indianapolis Marion County, Indiana, and further notice of the time and place of said hearing was given by the Commission in accordance with the provisions of Section 6, Chapter 70 of the Acts of the General Assembly 1933

This cause coming on for hearing in its regular order at the time and place named in the notice is now submitted to the Commission for hearing, finding and order.

And the Commission having heard the evidence and being duly advised in the premises finds:

That petitioner now has contracts covering the transportation of property over the above route with the following contractors, to-wit

1. Calumet Breweries Inc.
2. Northern Distributors Inc
3. State Brewing Co
4. Hoosier Breweries Inc
5. Mid West Beverage Co Inc
6. K. V. B. Corporation
7. Handy Beverage Co Inc

The Commission further finds petitioner has been operating its motor vehicles as a contract carrier of property since April, 19 3, for the above named shippers in the transportation of property and no reason exists why the same should not continue

IT IS THEREFORE ORDERED BY THE PUBLIC SERVICE COMMISSION that a permit to operate motor vehicles as a contract carrier of property over route No 1 be issued to Ziffrin Inc at such time as there shall be filed with and to the approval of the Tariff Department of this Commission written contracts or copies thereof with the above named shippers

And there shall be filed with the Secretary and to the approval of the Commission a bond, indemnity undertaking or policy of insurance

executed by a company mutual association or reciprocal exchange having legal authority to execute such instruments in the State of Indiana

IT IS FURTHER ORDERED that the holder of such permit under this order shall conform to and shall abide by Administrative Order No 11 700 of this Commission and any rule or regulation or order of this Commission now in effect or which may be adopted and the laws of the State of Indiana

Costs in this matter are to be paid

DECEMBER [illegible] 1935

Public Service Commission

Exhibit B-I-A

301

964

2511

INTERSTATE COMMERCE COMMISSION RECEIVED FEB 4 - 1936

[fol. 302] [Stamp:] Interstate Commerce Commission, Received Feb. 4, 1936.

STATE OF INDIANA, PUBLIC SERVICE COMMISSION

No. 209-B, 1

Approved: June 18, 1935

In the Matter of the PETITION OF ZIFFRIN, INC., FOR A PERMIT TO OPERATE MOTOR VEHICLES AS A CONTRACT CARRIER OF PROPERTY

A permit authorized by the Commission to operate motor vehicles as a contract carrier of property, intrastate, through cities and towns over public highways of the State of Indiana.

By the Commission:

On the 28th day of May, 1935, Ziffrin, Incorporated, 1231 West Morris Street, Indianapolis, Indiana, filed its verified application for a permit to operate motor vehicles as a contract carrier of property, intrastate, through cities and towns over public highways of the State of Indiana.

The application recites that the applicant heretofore operated motor vehicles as a contract carrier of property, intrastate, under permit number 407-C; that the applicant has operated in strict compliance with the rules and regulations of the Commission and the contracts filed with and approved by the Commission.

[fol. 303] [Stamp:] Interstate Commerce Commission. Received Feb. 4, 1936.

It is therefore ordered by the Public Service Commission that a permit be issued to Ziffrin, Incorporated, Indianapolis, Indiana, to operate motor vehicles as a contract carrier of property, intrastate, for the following contractors:

Calumet Breweries, Inc.
Northern Distributors, Inc.
State Brewing Co.
Hoosier Breweries, Inc.
Midwest Beverage Co., Inc.

K. V. B. Corporation
Handy Beverage Co., Inc.
Old Quaker Distilleries
Jos. E. Seagrams & Sons
Merchants Distilling
Kennedy Car Liner & Bag Co.

over and upon the following route, to-wit: Through cities and towns over public highways of the State of Indiana.

It is further ordered that before operating any motor vehicle upon the highways of this state under the said permit, the applicant shall number and letter the same as provided in the rules and regulations approved by the Commission, as follows, to-wit: No motor vehicle shall be operated for hire over the highways of this state, unless there shall be painted in a conspicuous place on each side thereof, also on the front and rear of each such vehicle, in letters and figures not less than two inches in height and not less than one fourth inch in width, the name of the certificate or permit holder, followed by the letters, "P. S. C. I." and number of the certificate or permit as the case may be. In the event it is not practical to place such lettering in a location so as to be at all times plainly visible to the traveling public, then the required letters, numbers, and words may be placed on a plate or plates, which plate or plates shall be attached to the front and/or rear of such vehicle in such manner that the letters, numbers, and words will at all times be plainly visible to the traveling public. In addition, there shall also be painted on each motor vehicle the number of that vehicle, each vehicle being numbered consecutively, which number will be discontinued when the vehicle it covers is discontinued (it being the intent and purpose that each number shall die with the motor vehicle).

Before beginning operation the applicant shall file, and at all times thereafter keep on file, insurance as provided by law, and to the approval of the Commission.

Ziffrin, Incorporated, Indianapolis, Indiana. No. 209-B, 1.

McCart, Trabue, Cook—Concur. Approved: June 18, 1935.

Attest: Richard W. Sharpless, Secretary.

JP.

[fol. 303a] [Stamp:] Interstate Commerce Commission. Received Feb. 4, 1936.

STATE OF INDIANA, PUBLIC SERVICE COMMISSION

I, Richard W. Sharpless, Secretary of the Public Service Commission, do hereby certify that the above and foregoing is a true and correct copy of Order No. 209-B, 1 as the same appears of record in the office of the Public Service Commission, this 22nd day of January, 1936.

Richard W. Sharpless, Secretary.

(Here follow 3 photolithographs, side folios 304-306)

STATE OF INDIANA

PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF [illegible]) No. 9038-C, 1
[illegible] RIN, INC., [illegible])
[illegible])
[illegible]) ALLOWED: May 18,1936.

A permit authorized by the Commission to operate motor vehicles as a contract carrier of property, intrastate, through cities and towns over public highways of the State of Indiana.

BY THE COMMISSION

On the 28th day of May 1936 Affrin, Incorporated, 1221 West Morris St., Indianapolis Indiana filed its verified application for a permit to operate motor vehicles as a contract carrier of property, intrastate through cities and towns over public highways of the State of Indiana

The application recites that the applicant heretofore operated motor vehicles as a contract carrier of property, intrastate, under permit number 407-C; that the applicant has operated in strict compliance with the rules and regulations of the Commission and the contracts filed with and approved by the Commission.

From the verified application filed herein, and from such other investigation as the Commission to this date has made, the Commission finds that a permit should be issued to the applicant to operate motor vehicles as a contract carrier over the routes as set out above without a public hearing thereon and it will be so ordered.

1

IT IS THEREFORE ORDERED BY THE PUBLIC SERVICE COMMISSION that a permit be issued to Affrin, Incorporated, Indianapolis, Indiana, to operate motor vehicles as a contract carrier of property, intrastate, for the following contractors:

Calumet Breweries, Inc.
Northern Distributors, Inc.
State Brewing Co.
Hoosier Breweries Inc
Mid West Beverage Co Inc
K[illegible] Corporation
Handy Beverage Co., Inc.
Old Maker Distilleries
Jos. [illegible] Garrard & Sons
Merchants Distilling

2511
INTERSTATE COMMERCE COMMISSION
RECEIVED
FEB 4 - 1936

that a permit be issued to Ziffrin, Incorporated, Indianapolis, Indiana, to operate motor vehicles as a contract carrier of property, intrastate, for the following contractors:

2511

INTERSTATE COMMERCE COMMISSION RECEIVED FEB 4 - 1936

Calumet Breweries, Inc.
Northern Distributors, Inc.
State Brewing Co.
Hoosier Breweries Inc
Mid West Beverage Co Inc
K... . Corporation
Handy Beverage Co., Inc.
Old Quaker Distilleries
Jos. . . Seagrave & Sons
Merchants Bottling
Kennedy Car Liner & Bag Co

over and upon the following route to-wit: Through cities and towns over public highways of the State of Indiana

IT IS FURTHER ORDERED that before operating any motor vehicle upon the highways of this state under the said permit, the applicant shall number and letter the same as provided in the rules and regulations approved by the Commission as follows, to-wit: No motor vehicle shall be operated for hire over the highways of this state, unless there shall be painted in a conspicuous place on each side thereof, also on the front and rear of each such vehicle, in letters and figures not less than two inches in height and not less than one-fourth inch in width, the name of the certificate or permit holder, followed by the letters, "... ...C.C." and number of the certificate or permit as the case may be In the event it is not practical to place such lettering in a location so as to be at all times plainly visible to the traveling public, then the required letters, numbers, and words may be placed on a plate or plates, which plate or plates shall be attached to the front and/or rear of such vehicle in such manner that the letters numbers, and words will at all times be plainly visible to the traveling public. In addition, there shall also be painted on each motor vehicle the number of that vehicle each vehicle being numbered consecutively, which number will be discontinued when the vehicle it covers is discontinued (it being the intent and purpose that each number shall die with the motor vehicle)

Before beginning operation the applicant shall file and at all times thereafter keep on file, insurance as provided by law, and to the approval of the Commission.

DeCAMP, TAUTE, COOK-CONCUR. Ziffrin, Incorporated 209-P, 1
Indianapolis, Indiana

APPROVED: JUNE 18, 1936.

ATTEST: Buckland W. Hamilton
Secretary

FB

100A

Exhibit B-I-A

IX PUBLIC UTILITIES COMMISSION OF OHIO

Certificate of [redacted]

(No. 6[illegible] C.)

No. 4[illegible]

A Certificate [redacted] Hereby Granted

[illegible]

a Motor Transportation Company under the laws of Ohio, whose office or place of business is at

Indianapolis, Indiana. [redacted] operate over the [illegible]

and by the Schedules heretofore approved by this Commission or which may hereafter be approved by this Commission, said route being as follows:

[illegible]:

Ohio-Indiana State Line and Ohio-West Virginia State Line via U.S. 50 through Cincinnati, Manchester, Portsmouth and Minersville.

Ohio-Indiana State Line and Ohio-West Virginia State Line via U.S. 50 and U.S. 52 to Cincinnati, U.S. 50 through Hillsboro and Chillicothe to Athens, also U.S. 35 through Xenia and Zanesville to the State Line.

Cincinnati and the Ohio-West Virginia State Line via U.S. 52 through Pikeington, Burlington C.H. Gimlerville, Ravenswille, Gallia and Gallipolis to the State Line.

Cincinnati and Cleveland via U.S. 42 through Xenia, Delaware, Mansfield and Medina.

Washington C.H. and Medina via U.S. 3 through Columbus, Mt. Vernon and Wooster.

Ohio-Indiana State Line and Washington C.H. via U.S. 35 through Xenia, Dayton and Hamilton.

Cincinnati and the Ohio-Michigan State Line via U.S. 25 through Dayton, Sidney, Lima, Findlay and Toledo.

Portsmouth and Toledo via U.S. 23 through Chillicothe, Columbus, Marion and Fostoria.

From junction of U.S. 23 and U.S. 250 and Pomeroy via U.S. 250 and 140 through Shortsville.

Cincinnati and Franklin via U.S. 4 through Hamilton to Middletown and U.S. 72 to Franklin, Bunsile and Oxford via U.S. 73.

Hamilton and Miamitown via County Road. Okeana and the Ohio-Indiana State Line via U.S. 127 to Hamilton and U.S. 127 through Harrison to the State Line. Junction of U.S. 127 and U.S. 27 and Ohio-Indiana State Line near College Corner via U.S. 27.

Cincinnati and junction of U.S. 127 and U.S. 422 23 via U.S. 127 through Hamilton, Eaton, Greenville, Van Wert and Upsal. Middletown and Eaton via U.S. 122 through Preble.

Ohio-Indiana State Line and Ohio-West Virginia State Line via U.S. 40 through Springfield, Columbus, Zanesville, Cambridge and Bridgeport.

Ohio-Indiana State Line and junction of U.S. 224 and U.S. 21 via U.S. 30 through Greenville, Piqua, and Urbana to Marysville, U.S. 6 through Bucyrus to Wooster, U.S. 30 to Plymouth and U.S. 42 to New Haven.

Sidney and junction of U.S. 47 and 6 via U.S. 47 through Bellefontaine and Richwood.

Zanesville and Wooster via U.S. 77 to junction of U.S. 16, U.S. 16 to Cochocton and U.S. 36 through Millersburg to Wooster.

Ohio-Indiana State Line and Napoleon via U.S. 20 through Celina.

Ohio-Indiana State Line and Marion via U.S. 30 through Van Wert to Delphos and U.S. 309 through Kenton to Marion. Ohio-Indiana State Line and Van Wert via U.S. 224 through Kenton to Marion. Delaware and Bellefontaine via U.S. 42. Junction of U.S. 30 and U.S. 250 and also via U.S. 68. Junction of U.S. 250 and U.S. 250 and Wellsville via U.S. 250.

Norwalk and the Ohio-West Virginia State Line via U.S. 250 through Upper Sandusky to Mansfield and U.S. 30 through Crestline, Canton and Lisbon to State Line at East Liverpool.

Ohio-Indiana State Line and Conneaut via U.S. 20 through Ashtabula to Painesville, U.S. 20 through Mentor and Fostoria to Tiffin, U.S. 224 through Greenwich and Norwalk to Akron, U.S. 8 through Barberton and Warren to Niles and U.S. 9 through Andover to Conneaut.

Cleveland and Canton via U.S. 21 to Valentown, U.S. 82 to Akron, U.S. 8 to Akron and U.S. 8 to Canton. Lorain and Medina via U.S. 20.

Bellevue and Ohio-Michigan State Line via U.S. 20 through Napoleon, and Toledo.

Akron and the Ohio-Indiana State Line via U.S. 20 through Fayette, Bryan and Ohio-Indiana State Line via U.S. 127 20 to Montpelier, U.S. 127 and U.S. 20 to junction of U.S. 20 and U.S. 20 to State Line.

Toledo and junction of U.S. 250 and U.S. 20 via U.S. 250.

Toledo and Ohio-Pennsylvania State Line via U.S. 2 through Port Clinton, Sandusky and Marysville to Lorain, U.S. 20 and 250 to Cleveland, U.S. 20 and 6 to junction of U.S. 62, U.S. 62 through Painesville to County Road [illegible] of Geneva, County Road to Ashtabula and U.S. 20 to the State Line. Cleveland and junction of U.S. 250 and U.S. 6 via U.S. 20 and U.S. 250.

Cleveland and junction of U.S. 322 and U.S. 9 via U.S. 322 through Cleveland and Orrell.

Cleveland and Lisbon via U.S. 422 through Chagrin Falls to Garrow, U.S. 250 through Niles to junction of U.S. 250 and U.S. 422, U.S. 422 to Youngstown and U.S. 164 through Columbiana to Lisbon.

2511

INTERSTATE COMMERCE COMMISSION RECEIVED [illegible] - 1935

2511

INTERSTATE COMMERCE COMMISSION
RECEIVED
1935

RESTRICTED TO IN TRANSIT COMMERCE ONLY

CONDITIONED that local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of Sections 614[illegible] of the General Code of Ohio.

[illegible] with the equipment listed with the Commission pursuant to law.

[illegible] shall be operated upon the time and rate schedules now on hereafter filed with and approved by the Commission and displayed at the stations and in each motor bus of said Company.

Witness the signature and seal of the Commission at Columbus, Ohio, this [illegible] day of June, 1931.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By [illegible]

Attest:

[illegible]

Secretary

Commissioners

Exhibit B-1-A

E 15

[redacted]
1099 Investment Building
Washington, D. C.

[redacted]

WASHINGTON, D. C.

KNOW ALL MEN BY THESE PRESENTS:

THE AMERICAN TRUCKING ASSOCIATIONS, INC. of Washington, D.C. was the proponent of THE CODE OF FAIR COMPETITION FOR THE TRUCKING INDUSTRY, being approved Code No. 278, including amendments, which Code was approved by the PRESIDENT OF THE UNITED STATES on February 10, 1934, under authority of the NATIONAL INDUSTRIAL RECOVERY ACT, Public No. 67, 73d Congress - approved June 16, 1933.

TED V. RODGERS of Scranton, Pennsylvania and Washington, D.C., was President of the AMERICAN TRUCKING ASSOCIATIONS, INC. when the aforementioned CODE was proposed and has since been President and is now President of the AMERICAN TRUCKING ASSOCIATIONS, INC., and the said TED V. RODGERS was elected a member of and made Chairman of the NATIONAL CODE AUTHORITY FOR THE TRUCKING INDUSTRY, which election was duly approved by the NATIONAL INDUSTRIAL RECOVERY ADMINISTRATION.

JOHN V. LAWRENCE of New York and Washington, D.C. was duly elected Secretary of the said NATIONAL CODE AUTHORITY and is also General Manager of the said AMERICAN TRUCKING ASSOCIATIONS, INC.

J. NINIAN BEALL of Washington, D.C. was of counsel for the said NATIONAL CODE AUTHORITY and is now of counsel for the AMERICAN TRUCKING ASSOCIATIONS, INC.

The said NATIONAL CODE AUTHORITY DID, at a regular meeting held on the 25th day of February, 1934, constitute the AMERICAN TRUCKING ASSOCIATIONS, INC. the Administrative Agency for said NATIONAL CODE AUTHORITY.

THE AMERICAN TRUCKING ASSOCIATIONS, INC. is, by virtue of its designation as ADMINISTRATIVE AGENT, the custodian of the registration records of the said NATIONAL CODE AUTHORITY and the said TED V. RODGERS has authorized the said JOHN V. LAWRENCE and the said J. NINIAN BEALL to issue certificates of registration data from the records of the said NATIONAL CODE AUTHORITY, for the purpose of enabling members of the MOTOR CARRIER INDUSTRY to comply with Sections 206(a) and 209(a) of the MOTOR CARRIER ACT, 1935.

WHEREFORE, pursuant to the aforementioned authority, THE AMERICAN TRUCKING ASSOCIATIONS, INC., by either of the said TED V. RODGERS, JOHN V. LAWRENCE or J. NINIAN BEALL, individually and in the alternative, hereby certifies that records of the above mentioned NATIONAL CODE AUTHORITY show that:

Ziffrin, Incorporated, Indianapolis, Indiana, registered under the aforementioned Code, and was issued registration certificate No. 154776 on August 8, 1934, and said registration shows five (5) for-hire vehicles and the said Code Authority issued for said vehicles registration insignia numbered B 41327 to B 41331, and said registrant reported that it operated in the States of Indiana, Illinois, Ohio and Kentucky as a For-Hire Carrier.

2511

INTERSTATE COMMERCE COMMISSION RECEIVED

THE AMERICAN TRUCKING ASSOCIATIONS, INC., issued this CERTIFICATE OF REGISTRATION

this 17th day of January, 1936.

AMERICAN TRUCKING ASSOCIATIONS, INC.

By [signature]

BEFORE ME, Eugene K. Murphy, A NOTARY PUBLIC IN AND FOR THE DISTRICT OF COLUMBIA, APPEARED J. Ninian Beall

Biffrin, Incorporated, Indianapolis, Indiana, registered under the aforementioned Code, and was issued registration certificate No. 150790 on August 8, 1935, and said registration shows five (5) For-Hire Vehicles and the said Code Authority issued for said vehicles registration insignia numbered B 41257 to B 41261, and said registrant reported that it operated in the States of Indiana, Illinois, Ohio and Kentucky as a For-Hire Carrier.

2511

INTERSTATE COMMERCE COMMISSION RECEIVED

THE AMERICAN TRUCKING ASSOCIATIONS, INC., issued this CERTIFICATE OF REGISTRATION this 17th day of January, 1936.

AMERICAN TRUCKING ASSOCIATIONS, INC.

By J. N. Allen Beall

BEFORE ME, Eugene L. Murphy, A NOTARY PUBLIC IN AND FOR THE DISTRICT OF COLUMBIA, APPEARED J. Nielen Beall, AND ACKNOWLEDGED THIS CERTIFICATE TO BE HIS ACT AND DEED.

SEAL

Eugene L. Murphy
Notary Public

E

☐ New Registration
☐ Renewal Registration

No. 29563

NAME Biffrin Incorporated

ADDRESS 1231 W. Morris St. Indianapolis

NRA CODE No. 278

THIS IS TO CERTIFY that the above-named member of the industry has registered under the Code of Fair Competition for the Trucking Industry as follows:

10 VEHICLES @ $3.00 EACH

FOR WHICH TOTAL FEES HAVE BEEN PAID IN THE SUM OF $ 60.00

SECOND CODE YEAR

NATIONAL CODE AUTHORITY FOR THE TRUCKING INDUSTRY
Indiana STATE CODE AUTHORITY FOR THE TRUCKING INDUSTRY

COUNTERSIGNED AT Indianapolis

ON April 7, 1936

Walter E. Frederick

Form D

Exhibit B-1-B

1001

[Vol. 307] [Stamp:] Interstate Commerce Commission. Received Feb. 4, 1936

Exhibit B-I-C-1

History of Business

This corporation was organized in 1933 and undertook immediately to haul beer to and from the State of Indiana. As business grew additional contracts were taken on and operations carried on thereunder. This company has been operating in this type of work continuously since its incorporation.

[redacted]

Shelbyville, Ind

Jan. 9, 1934

TO WHOM IT MAY CONCERN:

This is to advise that Liffris Inc. has hauled under contract for us since approximately 1930 to the present date, freight between Shelbyville, Indiana and [redacted] territories.

Our shipments were always handled in a very prompt and satisfactory manner and we highly recommend this company to be extremely dependable.

Yours very truly,
THE KENTUCKY GAS LIME & SAND CO.

PER [redacted]
TRAFFIC DEPT.

P.H. WHALEY
LS

[redacted]

LINK-BELT COMPANY

[redacted]

January 8, 1934.

TO WHOM IT MAY CONCERN:

This is to advise that the Liffris, Inc., have hauled freight for us for the last two years under contracts from the Calumet District.

They have handled all of our shipments in a very satisfactory manner and we would recommend this company as being most dependable and reliable.

14

STANDARD OIL COMPANY

Indianapolis, Indiana
January 8, 1936

TO WHOM IT MAY CONCERN:

This is to advise that Siffrin, Incorporated, have been hauling our shipments since October, 1934, under contract from Whiting, Indiana, to Indianapolis, Muncie and other points in our field. Its truck service has always been entirely satisfactory to us and we take pleasure recommending this company as being most dependable and reliable.

Yours truly

Standard Oil Co.

RHP:AP

BEMIS BRO BAG CO
BURLAP COTTON PAPER BAGS
BURLAP IMPORTERS

Indianapolis, Ind.

January 7, 1936

TO WHOM IT MAY CONCERN:

This is to advise that the Siffrin Inc. has hauled under contract to us since October, 1934, from 44 between Indianapolis and Greenwood, Ind.

Our shipments have been handled in a very prompt and reliable way.

E. F. Gilman
BEMIS BRO. BAG CO.

January 6, 1938.

TO WHOM IT MAY CONCERN:

This is to advise that the Ziffrin, Inc., have hauled freight for us for the last two years under contract from the Calumet District.

They have handled all of our shipments in a very satisfactory manner and we would recommend this company as being most dependable and reliable.

Yours very truly,

LIME-MALT COMPANY

Treffie Langer.

G.P.Roach
RD

STOKELY BROTHERS and COMPANY

growers and canners of vegetables

January 8th, 1938.

TO WHOM IT MAY CONCERN:

This is to advise that Ziffrin, Inc. has hauled merchandise for us under contract since November, 1934, to the present date between Tipton and Martinsville, Indiana on the one hand, and Cincinnati, Ohio, Chicago, Illinois and Peoria, Illinois on the other hand.

We are pleased to advise that our shipments were always handled in a most dependable manner and we highly recommend this Company to be extremely reliable.

Yours very truly,

...uary 7, 1936

TO WHOM IT MAY CONCERN:

This is to advise that the Ziffrin Inc. has hauled under contract to us since October, 1934, frei ht between Indianapolis and Greencastle, Ind.

Our shipments have been handled in a very prompt ...manner.

E. [illegible]
Traffic Mgr. Van Ch.

2511

INTERSTATE COMMERCE COMMISSION RECEIVED FEB 4 - 1936

Van Camps
INDIANAPOLIS, IND. U.S.A.

January 6th, 1936.

TO WHOM IT MAY CONCERN:

This is to advise that Ziffrin, Inc. has hauled merchandise for us under contract since November, 1934, to the present date between Tipton and Martinsville, Indiana on the one hand, and Cincinnati, Ohio, Chicago, Illinois and Peoria, Illinois on the other hand.

We are pleased to advise that our shipments were always handled in a most dependable manner and we highly recommend this Company to be extremely reliable.

Yours very truly,

B. M[illegible]
Traffic Manager

CMB:CL

Exhibit C-I-C-2

102

2

This Shipping Order

Shipper's No.

Agent's No. 14-2

To Chicago Ry

Nov 20 1931

From The National Exchange Company

Destination Stock Yards Station Chicago Ill. Via Penn Ry Chgo Term Ry

Consignee Jones

Route

Delivering Carrier

No. Packages	Description of Articles, Special Marks, and Exceptions	Weight (Subject to Correction)	Class or Rate	Check Column
2 2 Cars	Stuff Empty Returned	16800		
	12 Bales			
	4 Bales			
	6 Bales			
	10 Bales			1 Load
	10 Bundles Feed			
	10 Bundles Feed			

Received the property described above in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated above, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Permanent postoffice address of shipper

Agent or Cashier

Per

C

THIS SHIPPING ORDER

Shipper's No. 8

Agent's No.

ZIFFRIN TRUCK LINES

Received 8/V/31 100 From [illegible]

Consigned to [illegible]

Destination [illegible] State of County of

Delivering Carrier Car Initial Car No.

No. Packages	Description of Articles, Special Marks, and Exceptions	Weight (Subject to Correction)	Check Column
800	Old Plate Fiber Boxes Shipper	14700	
			people

8-A 13-31

Per Bob Wallace

Permanent postoffice address of shipper

If the above shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of consignor)

FAIRMONT GLASS WORKS, INC.

THIS SHIPPING ORDER

From THE HILTON-DAVIS COMPANY

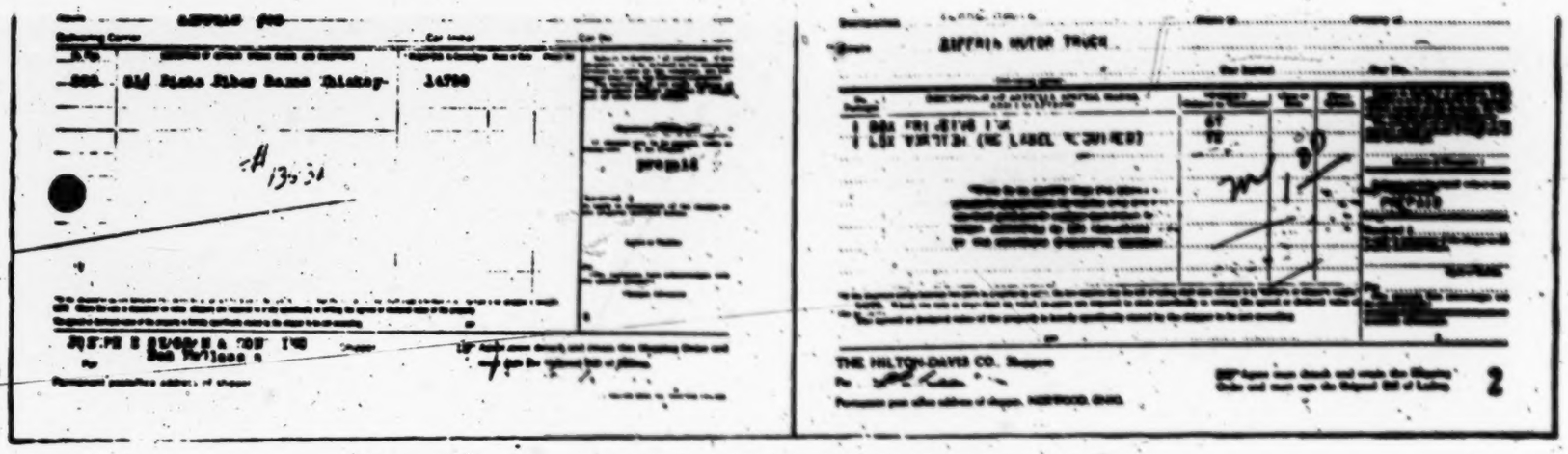
UNIQUE PRIVED PRODUCTS CO

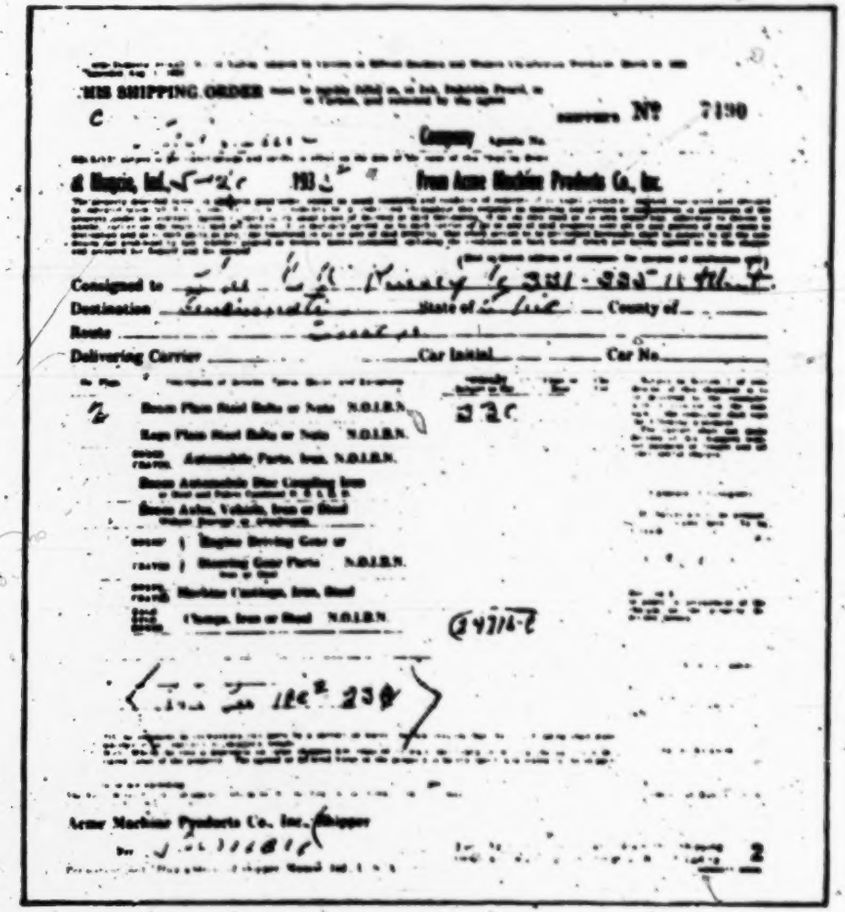
TERRE HAUTE

BUFFALO MOTOR TRUCK

THE HILTON-DAVIS CO. Shipper

2





NIB SHIPPING ORDER

No. 7190

From Acme Machine Products Co., Inc.

Consigned to

Destination

State of

County of

Route

Delivering Carrier

Car Initial

Car No.

Acme Machine Products Co., Inc., Shipper

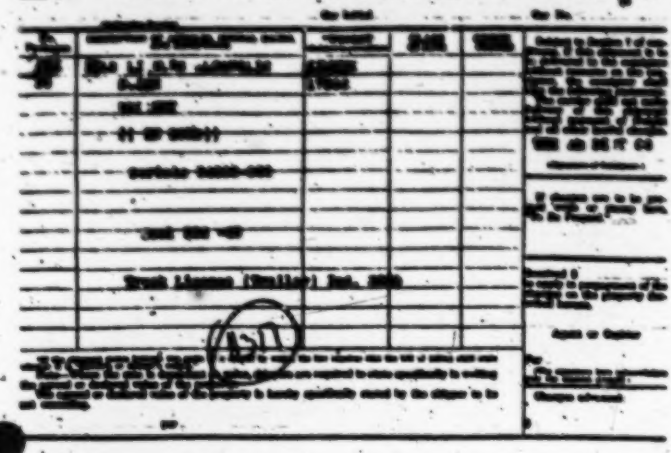
2511

309

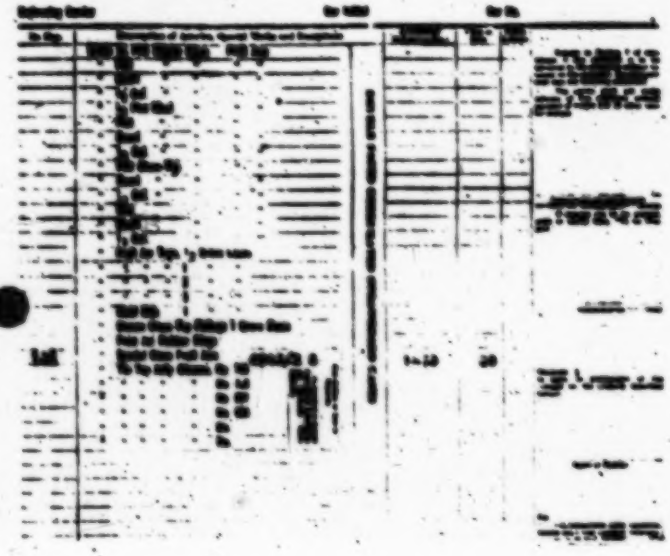
103

EXHIBIT D-1-C-3

THE AMERICAN DISTILLING COMPANY



This Shipping Order



THE SHIPPING ORDER

E. I. du Pont de Nemours & Co. (Inc.)

at Chicago, Ill. 13854

Consigned to

Destination State of County of

Route

Delivering Carrier Car Initial Car No.

2

E. I. du Pont de Nemours & Co. (Inc.) Shipper.

Per

C (2)

THE SHIPPING ORDER

THE [redacted] RAILROAD COMPANY

Dated at

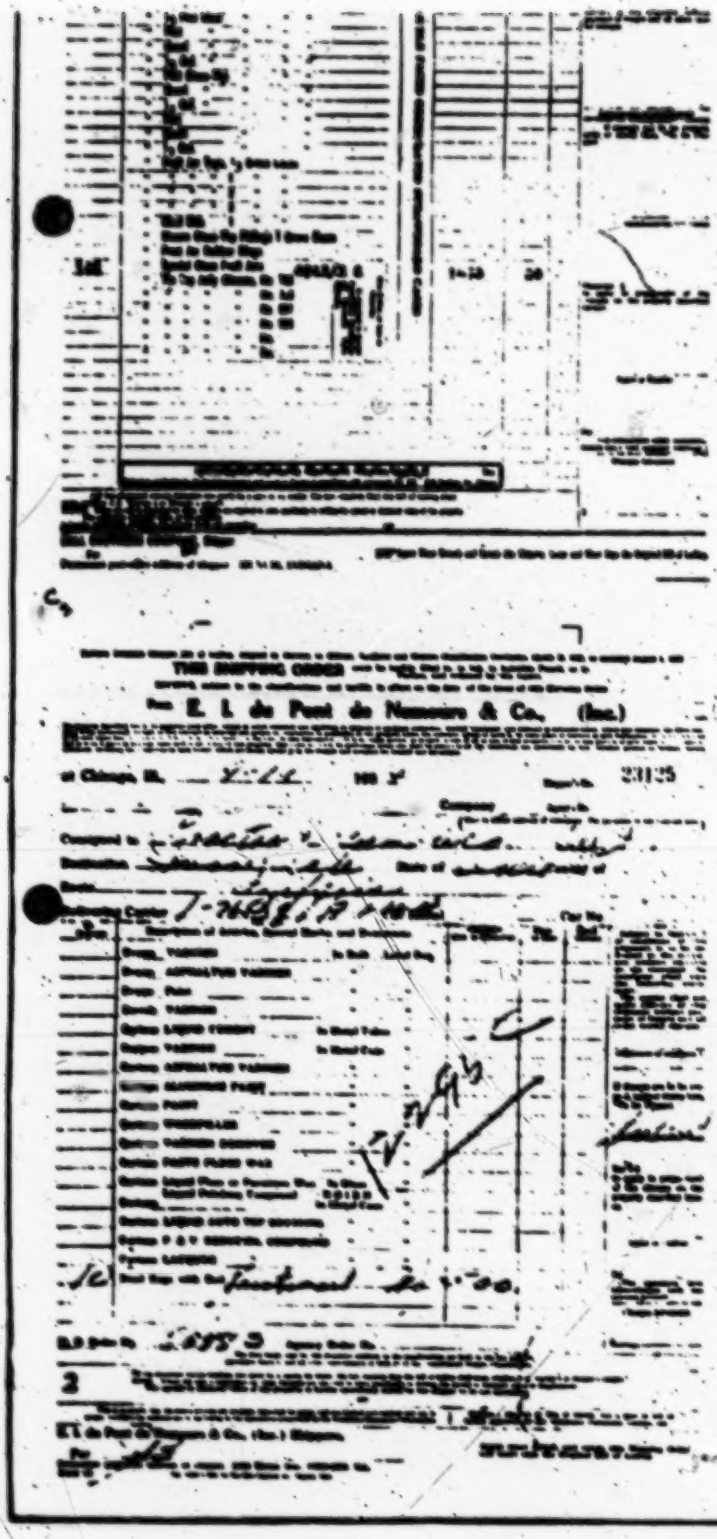
Consigned to

Destination State of County of

Route

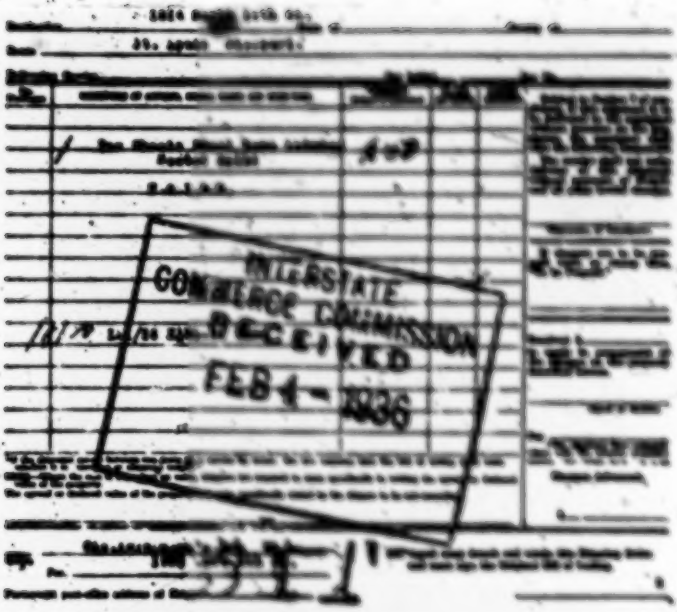
Delivering Carrier Car Initial Car No.

INTERSTATE COMMERCE COMMISSION
RECEIVED
FEB 4 1935



THIS SHIPPING ORDER

E. I. du Pont de Nemours & Co. (Inc.)


INTERSTATE
COMMERCE COMMISSION
RECEIVED
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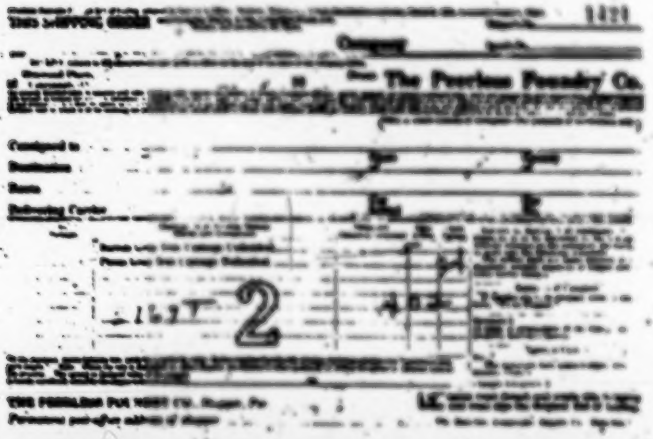
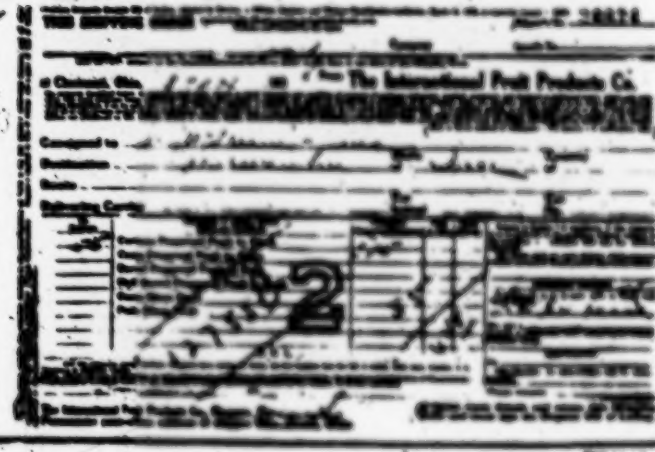
1936


The Pontiac Foundry Co.


The International Fruit Products Co.

Uniform Domestic Straight Bill of Lading adopted by carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930.

G

UNIFORM STRAIGHT BILL OF LADING

SHIPPING ORDER

Shipper's No._____

Agent's No._____

This shipping order must be legibly filled in, in ink, in indelible pencil, or in carbon, and retained by the Agent.

Iliffin Truck Lines.

INDIANA HARBOR BELT RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order

at WHITING, IND., 11/16/34 193

FROM

STANDARD OIL COMPANY

(INDIANA)

the property described below, in apparent good order, except as noted, (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is agreed, as to each carrier of all or any of said property over all or any portion of said route to said destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—for purposes of notification only.)

Consigned to Standard Oil Co. 201 So. Harding St.,

Destination Indianapolis, State of Indiana, County of

Route Iliffin Truck Lines.

Delivering carrier_____ Car Initial_____ Car No._____

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Signature of Consignor

If charges are to be prepaid, write or stamp here, "To be Prepaid."

to Pelion.

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per_____

(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$_____

PACKAGES No.	PACKAGES Kind	Description of Articles, Special Marks, and Exceptions	*WEIGHT (Subject to Cor.)	Class or Rate	✓
8	Bbl. Brls.	Pet. Lubg. Oil	4088		
	Bbl. Brls.	Pet. Lubg. Oil			
	Bbl. Brls.	Pet. Refd. Oil			
15	Bbl. Brls.	Gasoline N. O. I. B. N.	5855		
	Bbl. Brls.	Naphtha			
	Bbl. Brls.	Naphtha Chewm Spirits			
10	Bbl. Brls.	Pet. Oil N. O. I. B. N.	5110		
	Bbl. Brls.	Pet. Oil N. O. I. B. N.			
	Bbl. Brls.	Pet. Oil			
	Bbl. Brls.	Pet. Refd. Oil Dist.			
	Bbl. Brls.	Pet. Lubg. Grease			
	Bbl. Brls.	Pet. Lubg. Grease			
	Bbl. Brls.	Pet. Lubg. Grease			
	Bbl. Pails	Pet. Lubg. Grease			

PACKAGES No.	PACKAGES Kind	Description of Articles, Special Marks, and Exceptions	*WEIGHT (Subject to Cor.)	Class or Rate	✓
	Brls.	Pet. Lubg. Oil (In Metal Cans)			
	Brls.	Pet. Oil N. O. I. B. N. (In Metal Cans)			
	Brls.	Pet. Oil (In Metal Cans)			
	Brls.	Pet. Petrolatum (In Metal Cans)			
	Brls.	Pet. Lubg. Grease (In Metal Cans)			
	Brls.	Pet. Axle Grease (In Metal Cans)			
	Brls.	Pet. Axle Grease			
	Brls.	Paraffine Wax			
	Brls.	Pet. Wax, N.O.I.B.N.			
	Bbl. Brls.	Pet. Belt Dress. Liq.			
	Brls.	Pet. Belt Dress. Liq. (In Metal Cans)			
	Brls.	Stabilene, Liq. N.O.I.B.N. (In Glass)			
	Brls.	Polish, Furniture N. O. I. B. N. (In Metal Cans)			
	Brls.	Polish, Furniture N. O. I. B. N. (In Glass)			
	Brls.	Polish, Tubular N.O.I.B.N. (In Glass)			

2511

INTERSTATE COMMERCE COMMISSION RECEIVED

	Stl. Brls.	Pet. Refd. Oil			Boxes	Pet. Oil (In Metal Cans)
16	Stl. Brls.	Gasoline N. O. I. B. N.	6855		Boxes	Pet. Petrolatum (In Metal Cans)
	Stl. Brls.	Naphtha			Boxes	Pet. Lubg. Grease (In Metal Cans)
	Stl. Brls.	Naphtha Oleum Spirits			Boxes	Pet. Lubg. Grease (In Metal Cans)
10	Stl. Brls.	Pet. Oil N. O. I. B. N.	5110		Iron Pails	Pet. Axle Grease
	Stl. Brls.	Pet. Oil N. O. I. B. N.				Paraffine Wax
	Stl. Brls.	Pet. Oil				Pet. Wax, N.O.I.B.N.
	Stl. Brls.	Pet. Refd. Oil Dist.			Stl. Brls.	Pet. Belt Dre'g, Liq.
	Stl. Brls.	Pet. Lubg. Grease			Boxes	Pet. Belt Dre'g, Liq. (In Metal Cans)
	Stl. Brls.	Pet. Lubg. Grease			Boxes	Medicines, Liq.-N.O.I.B.N. (In Glass)
	Stl. Drums	Pet. Lubg. Grease			Boxes	Polish - Furniture N. O. I. B. N. (In Metal Cans)
	Stl. Pails	Pet. Lubg. Grease			Boxes	Polish - Furniture N. O. I. B. N. (In Glass)
	Stl. Brls.	Pet Petrolatum			Boxes	Polish-Vehicle-N.O.I.B.N. (In Glass)
		Pet Petrolatum				Pet. Asphaltum, Liq.
	½ Stl. Brls.	Pet. Lubg. Oil			Stl. Brls.	Insecticide Liq., N.O.I.B.N. Other than Agricultural
	5 Gal. Stl. Brls.	Pet. Lubg. Oil			Boxes	Insecticide Liq., N.O.I.B.N. Other than Agricultural (In Metal Cans)
	Crates	Pet. Lubg. Oil (In Metal Cans)			Boxes	Candles N. O. I. B. N.

2511

INTERSTATE COMMERCE COMMISSION RECEIVED FEB

Oleum

940-3

Inflammable Placards Applied.,
8 Boxes Oil Cans Not Rested Liquid Capacity Exceeding 1 Gill but not exceeding 1 Gallon 246#

Shipper's Load & Count — Actual Wt. of Dunnage

Weights are shown on this bill of lading by the shipper for the convenience of the carrier and can be verified at any time by an examination of the records on file in the shipper's office.

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note - Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding.

PER

2

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

STANDARD OIL COMPANY, Shipper,
(INDIANA)

Per

Ziffrin Truck Lines

CARRIER TAKING THIS SHIPMENT MUST OBTAIN THIS SHIPPING ORDER AND MUST SIGN THE ORIGINAL BILL OF LADING.

Permanent post-office address of shipper---Standard Oil Company (Indiana), 910 S. Michigan Ave., Chicago, Ill.

105

Exhibit B-I-C-3

	Stl. Brls.	Pet. Refd. Oil			Boxes	Pet. Oil (In Metal Cans)	
15	Stl. Brls.	Gasoline N. O. I. B. N.	6855		Boxes	Pet. Petrolatum (In Metal Cans)	
	Stl. Brls.	Naphtha			Boxes	Pet. Lubg. Grease (In Metal Cans)	
	Stl. Brls.	Naphtha Oleum Spirits			Boxes	Pet. Lubg. Grease (In Metal Cans)	
10	Stl. Brls.	Pet. Oil N. O. I. B. N.	5110		Iron Pails	Pet. Axle Grease	
	Stl. Brls.	Pet. Oil N. O. I. B. N.				Paraffine Wax	
	Stl. Brls.	Pet. Oil				Pet. Wax, N.O.I.B.N.	
	Stl. Brls.	Pet. Refd. Oil Dist.			Stl. Brls.	Pet. Belt Dra'g, Liq.	
	Stl. Brls.	Pet. Lubg. Grease			Boxes	Pet. Belt Dra'g, Liq. (In Metal Cans)	
	Stl. Brls.	Pet. Lubg. Grease			Boxes	Medicines, Liq.-N.O.I.B.N. (In Glass)	
	Stl. Drums	Pet. Lubg. Grease			Boxes	Polish - Furniture N. O. I. B. N. (In Metal Cans)	
	Stl. Pails	Pet. Lubg. Grease			Boxes	Polish - Furniture N. O. I. B. N. (In Glass)	
	Stl. Brls.	Pet Petrolatum			Boxes	Polish-Vehicle-N.O.I.B.N. (In Glass)	
		Pet Petrolatum				Pet. Asphaltum, Liq.	
	¼ Stl. Brls.	Pet. Lubg. Oil			Stl. Brls.	Insecticide Liq., N.O.I.B.N. Other than Agricultural	
	5 Gal. Stl. Brls.	Pet. Lubg. Oil			Boxes	Insecticide Liq., N.O.I.B.N. Other than Agricultural (In Metal Cans)	
	Crates	Pet. Lubg. Oil (In Metal Cans)			Boxes	Candles N. O. I. B. N.	

2511

INTERSTATE COMMERCE COMMISSION RECEIVED FEB

Parrott

Inflammable Placards Applied.,
2 Boxes Oil Cans Not Rested Liquid Capacity Exceeding 1 Gill but Not exceeding 1 Gallon 246#

Shipper's Load & Count _____ Actual Wt. of Dunnage _____

Weights are shown on this bill of lading by the shipper for the convenience of the carrier and can be verified at any time by an examination of the records on file in the shipper's office.

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note - Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding.

PER

2

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

STANDARD OIL COMPANY, Shipper,
(INDIANA)

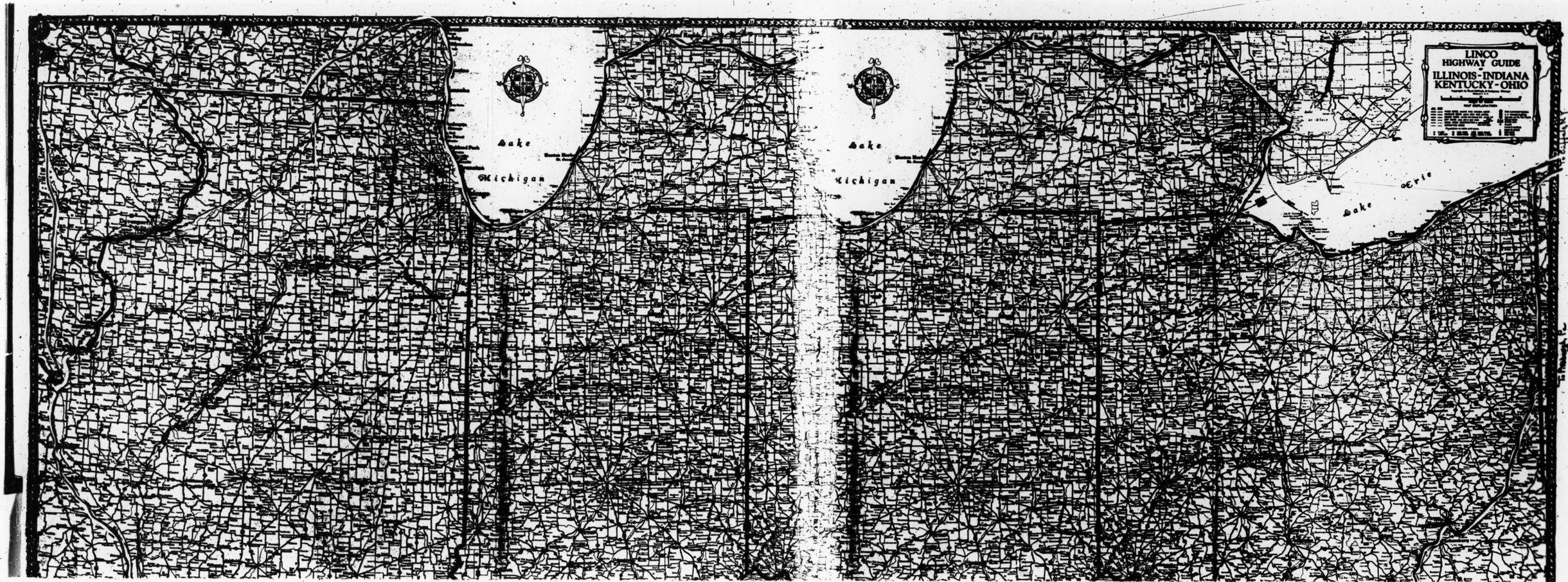
Per _____

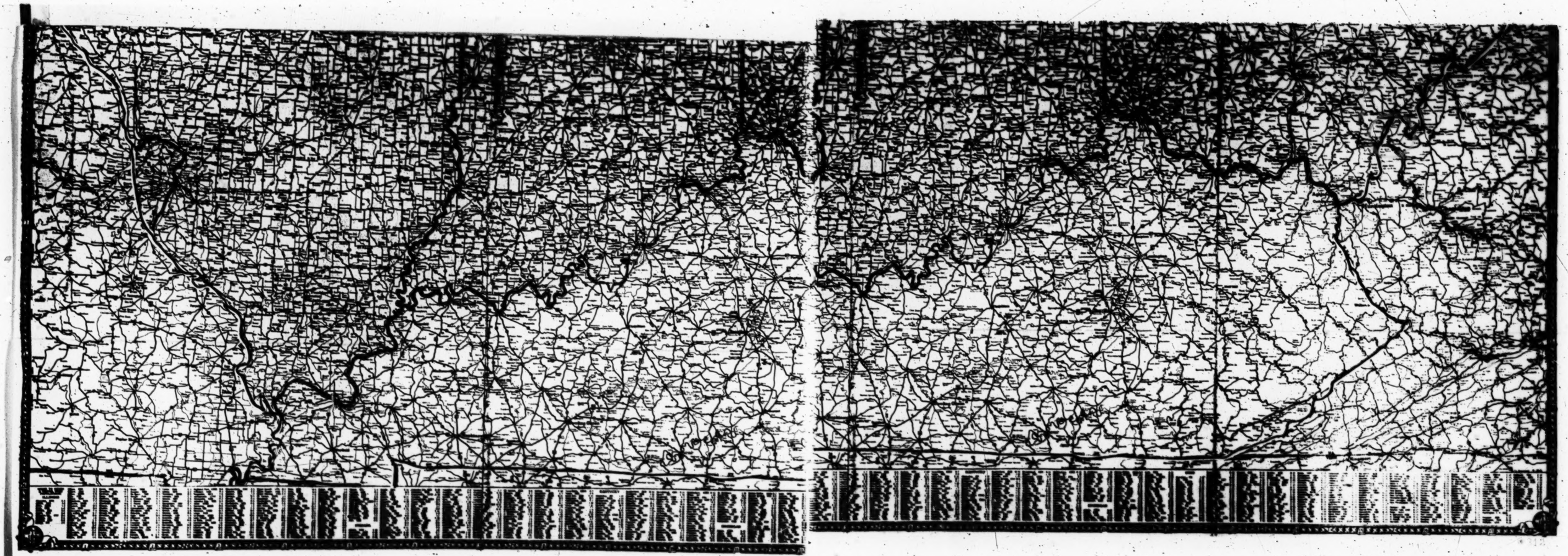
Ziffrin Truck Lines,
CARRIER OR HIS AGENT WILL RETAIN THIS SHIPPING ORDER AND MUST SIGN THE ORIGINAL BILL OF LADING.

Permanent post-office address of shipper---Standard Oil Company (Indiana), 910 S. Michigan Ave., Chicago, Ill.

105

Exhibit P-I-C-3


LINCO
HIGHWAY GUIDE
ILLINOIS-INDIANA
KENTUCKY-OHIO
Lake
Michigan
Lake
Michigan
Lake
Erie



[fols. 313-314] Plaintiff's Exhibit No. 3

Secretary's Certificate to Exhibit omitted in printing.

[fols. 315-316] Order of Commission of March 12, 1938 Omitted. Printed Side Page 50, ante.

[fol. 317] Order of Commission Dated June 4, 1938 Omitted. Printed Side Page 55, ante.

[fol. 318] Order of the Commission Dated June 23, 1938 Omitted. Printed Side Page 56, ante.

[fol. 319] Interstate Commerce Commission

Washington, D. C.

No. MC 2511

Ziffrin, Inc.

July 1, 1938.

Hearing in the above-entitled application, now assigned July 19, 1938, at Indianapolis, Ind., before Examiner A. E. Later, is postponed to the 10th day of August, A. D. 1938, at 9 o'clock a. m. (standard time), at the rooms of the Indiana Public Service Commission, Indianapolis, Ind., before Examiner A. E. Later.

By the Commission, division 5.

W. P. Bartel, Secretary.

[fol. 320] Interstate Commerce Commission

Washington, D. C.

No. MC 2511

Ziffrin, Incorporated

July 29, 1938.

Hearing in the above entitled application, now assigned August 10, 1938, at Indianapolis, Ind., before Examiner

H. C. Lawton, is postponed to the 12th day of September, A. D. 1938, at 9 o'clock a. m. (standard time), at the rooms of the Indiana Public Service Commission, Indianapolis, Ind., before Examiner H. C. Lawton.

By the Commission, division 5.

W. P. Bartel, Secretary.

[fol. 321] Interstate Commerce Commission

No. MC-2511

Ziffrin, Incorporated, Contract Carrier Application

Indianapolis, Ind.

Report and Order Recommended by H. C. Lawton, Examiner.

Served: Mar. 18, 1939.

Notice to the Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 20 days from date of service shown above, or within such further period as may be authorized for the filing of such exceptions. Otherwise, at the expiration of said period for the filing of exceptions the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed by other parties, or the order has been stayed or postponed by the Commission.

[fol. 322] Interstate Commerce Commission

No. MC-2511

Ziffrin, Incorporated, Contract Carrier Application

Submitted —— ——, Decided —— ——.

1. Applicant found to have been engaged on July 1, 1935, and continuously since, in bona fide operation as a contract carrier by motor vehicle of: (a) alcoholic liquors and beverages, from Louisville, Ky., Lawrenceburg and Terre

Haute, Ind., to points and places in Indiana and Illinois and to Cincinnati, Ohio; (b) empty bottles and other liquor distilling supplies from Terre Haute and Indianapolis, Ind., to Louisville, Lawrenceburg, and Cincinnati; (c) canned and preserved food products from Indianapolis to Cincinnati and Chicago, Ill.; (d) packinghouse products and meats from Chicago to Indianapolis, and (e) waste-paper board from Indianapolis to Chicago, over irregular routes.

2. Applicant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle, found to be controlled and managed in a common interest, and that the holding of a permit by applicant authorizing transportation of commodities transported by said common carrier between points common to the two carriers, has not been shown to be consistent with the public interest and the policy declared in section 202(a) of the Motor Carrier Act, 1935.

3. Permit granted, subject to the condition that the authority heretofore granted the said common carrier shall be modified so as to eliminate authority to transport commodities transported by applicant between points served by both carriers.

Howell Ellis and *L. C. Loughry* for applicant.

O. R. Livinghouse, Jack Goodman, F. D. Norvell, B. W. La Tourette, R. W. Brunow, and *W. K. Thomas* for protestants.

Edward Gusky, M. F. Chandler, Frank H. Luther, P. E. Perry, and *F. F. Gilbert* for interveners.

Report and Order

Recommended by H. C. Lawton, Examiner

By application [1] filed February 4, 1936, as amended, Ziffrin, Incorporated, of Indianapolis, Ind., seeks a permit [fol. 323] authorizing continuance of operations as a contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between Indianapolis, Terre Haute, Shelbyville, Hammond, and Lawrenceburg, Ind., on

[1] Under the "grandfather" clause of section 209(a) of the Motor Carrier Act, 1935.

the one hand, and on the other, various points in Indiana, Ohio, Kentucky, Illinois, western Iowa, southeastern Wisconsin, West Virginia, Buffalo, N. Y., Pittsburgh, Pa., and St. Louis, Mo., over irregular routes.

A so-called compliance order was entered herein on March 12, 1938, following an informal conference between applicant's officials and one of our field representatives, held on or about August 23, 1937. This compliance order approved the issuance of a permit to applicant upon its complying with the act and the Commission's rules and regulations thereunder, authorizing transportation over irregular routes of the commodities, between the points shown in the margin.[2] Following the issuance of the order and responsive to protests by motor carriers operating in the same general territory, the order was vacated and the proceeding referred to the examiner for hearing and the recommendation of an appropriate order thereon.

In addition to the question of the scope of the permit or other authority, if any, to be granted applicant, the order of hearing herein also placed in issue the question of the relations between applicant and Ziffrin Truck Lines, Incorporated, and if the two carriers were affiliated under a common control or management, whether under section 210 of the act a permit could be held by the applicant herein. The [fol. 324] other corporation mentioned is a common carrier with headquarters at Indianapolis and will hereinafter be referred to as the common carrier company. It has been granted a certificate as a common carrier of general com-

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[2] (a) Alcoholic liquors in cases or barrels between all points in the states of Indiana, Illinois, Ohio, St. Louis, Mo., and Louisville, Ky. (b) Canned and preserved food products; canned vegetables, canned fruits, canned soups, sauces, salad dressings, oleomargarine, and peanut butter from Indianapolis, Martinsville, Tipton, and Greenwood, Ind., to Chicago and Peoria, Ill., Cincinnati, Ohio, and Louisville, Ky. (c) Manufactured paper and paper board from Indiana to Chicago and Louisville. (d) Packing house products from Chicago to Indianapolis, Elwood, Anderson, Frankton, Tipton and Muncie, Ind., and (e) empty bottles, labels and other distillery supplies from Indianapolis, Terre Haute, and Winchester, Ind., Chicago and Alton, Ill., to Lawrenceburg, Indianapolis, Louisville, and Cincinnati.

modities with certain exceptions in *Ziffren Truck Lines, Inc. Common Carrier Application*, 6 M. C. C. 722, as described in the appendix hereto.

At the hearing herein the application was opposed by rail carriers, the Common Carrier Division of the American Trucking Association, Incorporated, and numerous motor carriers operating in the same general territory, and supported by a number of distilling companies, the Kraft-Phoenix Cheese Corporation, and Swift & Company.

Applicant was originally incorporated in Indiana in March, 1933. Its president and general manager, Mr. Sam Ziffrin, is president of the common carrier company referred to above, which operates in the same general territory as that embraced by the instant application. In 1933 Mr. Ziffrin, as an individual, operated a trucking concern known as Ziffrin Truck Lines, which apparently was engaged in the common carriage of property as the predecessor of the present common carrier company. At the suggestion of certain customers the applicant company was incorporated in order to secure certain routes in Indiana. It is clear that applicant was organized and incorporated principally in order to engage in the transportation of alcoholic liquors and beverages, in anticipation of the repeal of the eighteenth amendment to the Constitution, although the interstate permit originally granted applicant by Indiana did not so limit its operations, nor did the authority later granted it by Ohio. Applicant held authority as a contract carrier from Kentucky in 1935, but such authority was subsequently revoked. Applicant was also registered under a [fol. 325] code of fair competition for the trucking industry.

According to the testimony of Mr. Sam Ziffrin, applicant, following the informal conference upon which the compliance order referred to was based, limited its transportation business to that covered by the compliance order as hereinbefore set out until sometime in 1938, when the application was assigned for formal hearing. However, it is contended on behalf of applicant, that prior to the time it limited its operation as described, it transported a number of other commodities within a larger scope of territory, for which "grandfather" rights are claimed. At the hearing the application was amended to seek authority embracing

the commodities and the territory described in the margin.[1]

As indicated, the record is clear that applicant was organized especially for the purpose of engaging in the business of transporting beer and other alcoholic beverages and liquors and supplies used in their manufacture. Prior to repeal of the eighteenth amendment, applicant engaged in the transportation of beer when its manufacture was legalized. In the early days of repeal the transportation of distilled liquors by motor vehicle was attended with considerable hazard due to the danger of hijacking. As a result of this situation, representatives of the leading distilleries requested applicant's president to provide a system of pro- [fol. 326] tection. A system of policing and convoying of liquor transported by truck was thereupon inaugurated in connection with applicant's operation and has been continued since.

Mr. Sam Ziffrin testified to the transportation of the commodities hereinbefore enumerated, to all points in the territory claimed, and in particular the transportation of alcoholic liquors to numerous points in the territory. Testimony was also offered in support of the application by representatives of shippers for whom applicant is alleged to have provided transportation. The General Traffic Manager of the Frankfort Distilleries, who is also an official in the Kentucky Liquor Producers Association, composed of 26 distilling companies, testified to the use of applicant's service by his company under agreement or contract since prior to July 1, 1935, for the transportation of alcoholic liquors from Louisville to points throughout the territory claimed by applicant, and especially to Chicago, Rockford, Springfield, Pontiac, Decatur, and Metropolis in Illinois, and Indianapolis, Fort Wayne, and Indiana Harbor, Ind., Cin-

[1] *Commodities:* Canned, preserved, and prepared foods, packing house products, and fresh meats, alcoholic liquors, malt liquors, and distillery supplies, including bottles milk, condensed and evaporated, dairy products, including oleomargarine, cheese, and by-products, paper products and paper articles, shoe polish and dressing, batteries, and steel.

Territory: That portion of the state of Kentucky within a radius of 150 miles of Louisville; Indiana, Ohio, Illinois; St. Louis, Mo., Pittsburgh, and Schenley, Pa., and Milwaukee, Wis., and points in Wisconsin intermediate to Milwaukee and Chicago, Ill.

cinnati, Ohio, and Milwaukee. Although the witness specified the weights of some of the shipments claimed to have been handled by applicant prior to July 1, 1935, he was unable to specify the dates on which such shipments moved. The contract under which applicant is alleged to have performed the transportation for this company was verbal, at least prior to July 1, 1935; was made between applicant's president and the witness, and modified from time to time with respect to the rates to be charged.

The general traffic manager of Joseph Seagram & Sons, Inc., and subsidiary distilling companies, testified that the companies he represented had used applicant's service for [fol. 327] the transportation of alcoholic liquors and distilling supplies, from Lawrenceburg, Ind., and Louisville, Ky., to the territory covered by the application, excepting Pittsburgh and Newcastle, Pa., and Canton, Cleveland, Columbus, Cincinnati and Toledo, Ohio. However, the cross-examination developed that the witness was stationed at Relay, Md., prior to 1938, and that his knowledge was gleaned from inspection of the records of the company. The same company also used the common carrier company for less-than-truck load shipments only, and it is asserted that applicant was employed for the transportation of truckloads of alcoholic beverages. Prior to November 1936, the agreement between this concern and applicant was verbal and of the same general nature as the agreement between applicant and the Frankfort Distillery.

The representative of the Schenley Distilleries, Incorporated, which owns and controls some 13 distilleries, testified to the use of applicant's service under verbal contract on and prior to July 1, 1935, for the transportation of alcoholic beverages and distillery supplies from Lawrenceburg, Ind., Schenley, Pa., and Frankfort, Lexington, Louisville, and Covington, Ky., to destinations in the territory claimed by applicant, and specifically to St. Louis, Louisville, and Canton, Cleveland, Columbus, and Toledo, Ohio, some 15 points scattered throughout Indiana, and some 43 destinations in Illinois. The witness' information relative to this transportation was taken from applicant's records and the witness was unable to specify any particular movement from or to any of the points named. The agreement under which the transportation was performed was originally verbal and apparently of the same type as those described by previous [fol. 328] witnesses. This company also used the common

carrier company at various times for the movement of less-than-truckload quantities of its products.

A representative of Swift & Company of Chicago, Ill., and its subsidiaries, testified to having used applicant's service for the transportation of meats and packing house products, on and prior to the statutory date in the territory claimed by applicant, and particularly to Louisville, Cincinnati, Harrington, Middletown, Dayton, Piqua, Sidney, and Greenville, Ohio, and Richmond, Connersville, Greenfield, Anderson, Muncie, and Indianapolis, Ind. The transportation was performed under a form of agreement which related principally to insurance requirements and was used by this company for all forms of truck transportation, including common carriers. The rates under which this company contracted for the transportation were covered by separate agreements. The company used the services of common carriers where the rates were lower than contract carriers, and it employed both applicant and the common carrier company.

The general traffic manager of the Kraft-Phoenix Cheese Company also testified to the use of applicant's service under a verbal contract on and prior to July 1, 1935, for the transportation of cheese, salad dressing, and related commodities between points in Indiana, Illinois, Kentucky, within a radius of 150 miles of Louisville, Ohio, and St. Louis, Mo., and principally between such cities as Chicago, Louisville, Indianapolis, and St. Louis. However, the witness was unable to refer to any specific shipments by dates, weights, or other methods of identification, and it developed that he had no personal knowledge of the contract between his concern and applicant on the statutory date, his knowl- [fol. 329] edge having been gleaned from conversations with superior officials.

The treasurer of the Beveridge Paper Company of Indianapolis testified to the use of applicant's transportation service on and prior to the statutory date under a verbal agreement covering the transportation of waste paper board manufactured by the company, to points in the territory embraced in the application. The testimony indicated that the principal transportation had been to Louisville, St. Louis, Chicago, Milwaukee and Cincinnati. This witness was unable to specify any particular shipment to any specific point in the territory and it appears that the verbal agreement between the company and applicant did not differ from

agreements between the company and other concerns entered into by the company on or about July 1, 1935.

Other testimony by a representative of a company located at Indianapolis which manufactures oleomargarine, and on behalf of a company engaged in the canning and preserving of food products relative to the use of applicant's service under verbal agreement, was similar to that considered above. The agreement between applicant and the canning company was entered into with applicant's president. Prior to the Motor Carrier Act the same company used other carriers, including common carriers, and the arrangements with the others were identical with the arrangements entered into with applicant. In the words of the witness: "Prior to Federal regulation they were identical. They remained identical up until about August, 1937, when I made arrangements as to rates, rules and regulations governing the transportation. We endeavored to see that they were identical, that there was not any departure, any difference between them". Apparently the agreement in effect prior to the date mentioned by the witness related wholly to the charges for the service performed by applicant.

[fol. 330] While the testimony considered is entitled to weight in establishing the general nature of applicant's business on and prior to the statutory date, in view of the opposition to the application, such testimony cannot be considered as indicating definitely the scope of the authority to which applicant is entitled. However, pursuant to a stipulation by all parties of record, applicant, subsequent to the hearing, furnished a digest of traffic handled by it since prior to July 1, 1935, compiled from shipping documents in its possession. This digest was accompanied by comments of certain of protestants' counsel, who, pursuant to the stipulation, checked the digest with the shipping documents prior to its submission.

It may be observed that while the digest, especially with respect to the period prior to the statutory date, does not support the broad claims of the application, it does indicate conclusively that applicant's principal traffic about that period was alcoholic liquors and distilling supplies. That this is still applicant's principal operation is borne out by testimony of the president relating to a recent occasion when applicant was called upon to perform the transportation of 3,500 barrels of whiskey from Lawrenceburg to

Cincinnati within a period of about 24 hours, requiring the use of about 80 trucks to complete the movement.

With respect to the month of June 1935, the digest submitted by applicant shows the movement of 32 truckloads and one less-than-truckload shipment of alcoholic liquors from Lawrenceburg to Chicago, 8 truckloads of the same commodity from the same origin to Cincinnati and some 69 shipments between Lawrenceburg and Fort Wayne, Indianapolis, Gary, Terre Haute, and South Bend, Ind., of [fol. 331] which all but 7 were truckloads.[4] The digest also shows 2 truckloads of bottles moving from Indianapolis to Cincinnati, 7 shipments of bottles from Lawrenceburg to Terre Haute, of various weights, but mostly in truckloads, 2 shipments of canned goods from Indianapolis to Cincinnati, 1 shipment of paper from Indianapolis to Chicago, and 1 from the same origin to Aurora, Ill., and 2 shipments of meat from Chicago to Indianapolis. Two shipments of alcoholic liquors are shown as having moved from Frankfort, Ky., to Chicago, but there appears to have been no shipping documents to support these movements. No documentary evidence was submitted respecting transportation by applicant in 1936. The digest shows the movement of many commodities to numerous points in 1937, of which the principal part consisted of alcoholic liquors and empty containers to an increased number of destinations, particularly in Illinois. In addition, the digest shows for that year the movement of canned goods, oleomargarine, butter and waste paper board. Other than alcoholic liquor, the bulk of the shipments within a recent period, except for a few scattered movements of other commodities, consisted of canned goods and waste paper board, from Indianapolis to Chicago, packing-house products, and meat from Chicago to Indianapolis.

Two affidavits were submitted with the digest, in an effort to account for certain other documentary evidence, and to explain why the same could not be located. These affidavits cannot be considered as evidence.

Many of the bills of lading from which the digest was compiled, bore the name of Ziffrin Truck Lines, or some variation thereof, but in most instances the delivery receipt

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[4] Shipments from Lawrenceburg to other points in Indiana are alleged to have moved over interstate routes.

appears to have been that of applicant. The records shows that in general the bills of lading were made out by the [fol. 332] shippers and in the light of the evidence, it is not unreasonable to assume the existence of some confusion in the minds of the shippers or their employees as to whether applicant or the common carrier company was involved in the transportation. Although there is documentary evidence as to the recent transportation of liquor from Frankfort, Ky., the record shows that applicant ceased transportation from Kentucky points, except Louisville, and to Wisconsin and Pennsylvania points, in 1937, and did not resume such transportation until some time in 1938. The reason indicated for the cessation of such transportation was the pendency of the informal proceeding referred to and the prospect of receiving a permit without the necessity of a formal hearing. This is not an "interruption of service, over which applicant had no control", within the meaning of such language in the "grandfather" clause.

While documentary evidence respecting applicant's transportation of liquor from Louisville on and prior to July 1, 1935, is lacking, the testimony establishes that applicant was transporting from that point and the fact that it was does not seem to be questioned by protestants.

Giving the most liberal weight possible to the supporting testimony which is corroborated by the documentary evidence, especially that relating to the continuance of operations, it appears that transportation by applicant on July 1, 1935, which has been continued since, has been confined to alcoholic liquors and beverages in bottles, in cases or in barrels, from Louisville, Lawrenceburg, and Terre Haute, over irregular routes, to points in Indiana and Illinois, and to Cincinnati; canned and preserved food products from Indianapolis to Cincinnati and Chicago, packing-house products and meats from Chicago to Indianapolis, waste paper board from Indianapolis to Chicago, and empty [fol. 333] bottles and other liquor distilling supplies from Indianapolis and Terre Haute to Louisville, Lawrenceburg, and Cincinnati.

Some of the protestants intimate strongly that applicant's operation as of the statutory date was not that of a contract carrier. As noted, many of the agreements between applicant and the shippers served were very general in character. However, this was undoubtedly true of the

agreements under which many contract carriers operated on the "grandfather" date, and it *is* was not until division 5 promulgated the rules respecting such contracts in *Contracts of Contract Carriers*, 1 M. C. C. 628, that principles were laid down governing such contracts. Since that decision and the order thereunder, applicant has complied therewith by the filing of bi-lateral contracts with the Commission. It is clear, however, that applicant restricted its transportation to certain customers and commodities, and generally performed such transportation under some sort of agreement or contract. The principal consideration which points to the fact that applicant's service as of July 1, 1935, was that of a contract carrier, is the fact that there was no holding out to the public to furnish the transportation in which applicant engaged.

An important question for determination is the matter of applicant's affiliation with the common carrier company and whether the two are so united, under a common management or control as to come within the provisions of section 210 of the act. The portion of the order of hearing which brings this question in issue reads as follows:

Notice is hereby given that although application herein is for a certificate or permit on From BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC 2510), and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of section 5(6), Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in section 202(a) of the Motor Carrier Act, 1935, within the meaning and contemplation of section 210 of said Motor Carrier Act, 1935.

[fol. 334] Applicant's counsel strenuously oppose the consideration of any evidence bearing upon the issue raised by the quoted part of the order of hearing. In particular, they question the legality of any inquiry into the corporate relations, because of the reference to section 5(6) of Part I, which, they contend, has no application whatever to motor carriers. It is true, of course, that the only provisions of Part I of the Interstate Commerce Act having application to carriers subject to regulation under Part II, or the Motor

Carrier Act, are made so by specific reference in the Motor Carrier Act. However, it is clear that what is implied in the quoted portion of the notice of hearing is the question of relations between the two companies. For the purpose of the inquiry the language in section 213 (b)(1) of the act might just as readily have been employed, since, except that it relates to motor carriers instead of rail carriers, it contained the same language as section 5(6), prior to the amendment of section 213 on June 28, 1938. The amendment did not change section 213(b)(1) in any important particular. The paragraph referred to appropriately describes relations between carriers by which one person can control two or more motor carriers. Prior to the amendment it read as follows:

It shall be unlawful for any person, except as provided in paragraph (a), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more motor carriers which are not also carriers by railroad, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this part and in violation of this paragraph. As used in this paragraph, the words 'control or management' shall be construed to include the power to exercise control or management.

[fol. 335] The reasons for the inquiry were certain of the findings in *Ziffrin Truck Lines, Inc., Common Carrier Application, supra,* and the issues raised by certain protests and petitions filed in the instant proceeding. Likewise, the similarity of the names of the two carriers, the fact of their offices being in the same city, and the further fact that territory included in the respective applications is quite similar in many respects, would naturally raise some question as to the relations between the two companies. It will be noted from the appendix that the common carrier company has been authorized to serve a number of important points served by applicant, such as Chicago, Indianapolis, and Louisville.

In the report and order dealing with the application of the common carrier company, to which appropriate reference has been made in the record in this proceeding, it was found that the president thereof was also president of the applicant herein and that certain of the vehicles used in the service of the common carrier and applicant herein bore the names of both carriers, and were registered in the names of both companies. At least one of the drivers who testified in that proceeding was unable to state definitely which company employed him on or about the statutory date, and one other driver had occasionally hauled for the applicant herein and had considered the president of the two concerns as his employer.

The testimony herein also related to the registration of trucks in the names of the two companies. It also appears from the testimony that the same driver may operate a truck in one direction for applicant and on the return trip transport traffic in the name of the common carrier company. Many of the vehicles used have the names of both companies painted on the sides.

[fol. 336] Applicant's president owns 98 percent of the stock of the common carrier company and manages that carrier. It is also clear that in addition to managing, he controls the applicant herein, although he does not own a majority of the stock. However, he does own outright 49.5 percent of the stock, and he and a relative together own 50.5 percent of the stock. Another individual who owns 49 percent of the stock lives in the State of New York, and has not attended a meeting of the directors of the applicant company for over two years. Under such circumstances Mr. Sam Ziffrin, although owning slightly less than a majority of the stock, is in a position to exercise control of applicant as well as the common carrier company. See *United States* vs. *Union Pac. R. Co.*, 226 U. S. 61, 95 and 96.

Although the records of the two corporations are now kept separately, it appears that at one time they were so comingled that an order was entered February 7, 1936, by the Public Service Commission of Indiana, pursuant to a hearing held October 22, 1935, which required the two concerns to keep separate and distinct records. It is clear that many of the shippers who have dealt with applicant regard Mr. Sam Ziffrin as the person who completely controls the two companies. One of the witnesses, who

was interrogated as to whether, prior to October 1936, certain traffic moved in applicant's trucks or in those of the common carrier, stated: "you will have to call and ask Mr. Ziffrin how he handles that material. I do not have any supervision over that."

Section 210 of the act provides as follows:

No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in section 202(a) of this part.

[fol. 337] The section has been considered in a number of cases, but two examples will suffice to illustrate the principles which have guided in its administration.

In *Nelson Extension of Operations*, 1 M. C. C. 285, the applicant was granted authority as a contract carrier of bread and newspapers between Birmingham, Ala., and Columbus, Miss., and found to be a common carrier of motion picture films and theatre accessories and supplies between Birmingham and certain other points in Alabama, under the "grandfather" clause. The proposed contract carrier service duplicated the common carrier service only over a portion of one route, and as noted, the commodities handled were different in the two services. On the question of dual operation, division 5 said:

Over that portion of one route where it is here proposed to operate both common and contract carrier services the two services are not competitive one with the other, and each serves a different class of shippers. We therefore conclude that this dual operation would be consistent with the public interest and the policy declared in section 202(a) of the act.

It will be noted, there was no competition between the two services because each handled different commodities. A case in which it was proposed to handle, as a contract carrier, the same commodity transported as a common carrier, is *Dakota Transp. Inc., Common Carrier Application* 3 M. C. C. 621. In that proceeding the applicant

sought authority under the "grandfather" clauses of the act, as a contract carrier of catalogues in a portion of the territory in which it also claimed rights as a common carrier of general commodities. Division 5 said:

"General commodities" includes catalogues, and if applicant be authorized to transport the former, as a common carrier, and the latter, as a contract carrier, over the same routes, shippers of catalogues with whom applicant has special contracts will pay the contract rates and other shippers thereof will pay applicant's common carrier rates, [fol. 338] which may result in discrimination. We are, therefore of the opinion that the grant of dual authority to transport catalogues over the same routes would not be consistent with the public interest and the policy declared in section 202(a), and the certificate which we shall grant applicant will not include authority for the transportation of catalogues."

Applicant argues that section 210 cannot apply to the operation of the applicant herein, because applicant and the common carrier company are separate corporations, holding different types of State authority and performing different kinds of service. It is further argued that the section could not apply to the situation herein because it existed prior to the enactment of the Motor Carrier Act, and because section 210 only relates to the holding of dual authority "by the same person", as applicant's counsel express it.

Section 210 relates to the holding of dual authority after January 1, 1936. It therefore applies where the person seeking such authority was lawfully engaged in both common and contract carrier operations prior to the act, as was the applicant herein and the common carrier company. Is the section any less applicable in the case of persons, who by reason of ownership and control of separate corporations, control both common and contract carrier transportation of the same commodities between the same points? In other words, upon the facts shown of record herein, is it proper to look behind the corporate veil, or is the Commission required to deal with applicant and the common carrier company as separate corporate entities?

The modern view respecting the separate identities of corporations and individuals composing them is well stated in 13 American Jurisprudence 160, as follows:

[fol. 339] The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, would be disregarded by the court.

In was also said in *Metropolitan Hauling Company* vs. *Snyder*, 79 Fed. (2) 263:

There has been a growing tendency upon the part of the courts to disregard corporate entity and to treat the stockholders thereof as an association of individuals when the interests of justice are to be served, (citing among other cases, *Chicago, M. & St. P. Ry. Co.* vs. *Minneapolis Civic and Commerce Asso.* 247 U. S. 490.)

The view of the Supreme Court upon the question is thus stated in *New Orleans Ice Co.* v. *Helvering*, 292 U. S. 435:

As a general rule a corporation and its stockholders are deemed separate entities * * *. Of course the rule is subject to the qualification that the separate identities may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights.

In administering other sections of the act the Commission has not hesitated to disregard the apparent separation of corporate entities where such action was necessary. Thus in *Bigley Brothers, Inc. Contract Carrier Application*, 4 M. C. C. 711, where both Bigley Brothers, Incorporated, and Bigley Trucking Corporation sought authority under the "grandfather" clauses of the act in the same territory, division 5 said:

The same individuals own the stock and manage the affairs of both corporations. Each applicant holds title to certain motor vehicle equipment, which, however, is used in discriminately by both. Applicants are engaged in a single business and are, therefore, entitled to only one permit or certificate.

In the case of a motor common carrier corporation seeking to acquire control of a contract carrier, or vice versa,

under section 213 of the act, the Commission has applied [fol. 340] section 210, and either denied the application for authority to purchase, or so conditioned its approval thereof as to preclude the possibility of dual operation. Thus in *Oilfields Trucking Co.-Purchase-Dunbar*, 5 M. C. C. 137, applicant, a California corporation claiming rights as a common carrier of general commodities, and particularly of petroleum products, between points in California, Nevada and Utah, sought to purchase the operating rights of a contract carrier of petroleum products, which operated over part of one of the same routes applicant traversed in its operations. Division 5 said:

> When common-carrier and contract carrier status are combined in the same person, the opportunities for unfortunate complications are great, * * *. The facts in the present case, as distinguished from those in the case just cited (*Nelson Extension of Operations, supra*) show that applicant's services as a common and contract carrier not only would be competitive, but also would concern the same class of shippers. * * * Everything considered, applicant has not shown that it would be consistent with the public interest for it, a common carrier, to acquire the operating rights of vendor, a contract carrier. Accordingly an order will be entered denying the application.

The case most in point with reference to the considered situation is *Universal Service, Inc.-Purchase-W. R. Arthur & Co. Inc.* 15 M. C. C. 247. There Universal Service, Incorporated, of Milwaukee, Wis., operating as a common carrier of automobiles between points in Illinois and Wisconsin sought authority to purchase, for 145 shares of its capital stock, certain operating rights of W. R. Arthur & Company, Incorporated, of Janesville, Wis., a contract carrier of automobiles to points and places in Illinois, Indiana, Iowa and Wisconsin, and a common carrier of automobiles by drive-away in 29 states and by truck-away in 8 states, including the states served as a contract carrier. Arthur also sought to acquire control of Universal by purchase of the latter's capital stock. The purpose was to eliminate the dual operations of Arthur by transferring [fol. 341] its common carrier operations to Universal, Arthur to continue operations only under its claimed contract-carrier rights. As division 5 said:

• • • such common carrier and contract-carrier operations would be conducted, respectively, by separate corporate entities, but under common control and management. • • • We are not convinced that the objectionable features incident to dual operations by a single carrier, which we are authorized to prevent under the provisions of section 210, would be obviated here merely by the expedient of dividing the rights for operation by separate corporate entities. In any event the present record does not contain evidence in justification for such operations or otherwise warranting findings that these transactions would be consistent with the public interest, involving as they do effectuation of common control of two corporations, one of which would operate as a contract carrier and the other as a common carrier, transporting the same commodities in the same territory in part, and serving the same class of shippers. • • • Evidence sufficient to support the required statutory findings not having been adduced, the applications will be denied.

It seems clear that section 210 applies in the case of two affiliated corporations under common control or management, claiming common and contract carrier rights respectively, between the same points. An individual who instituted both kinds of service lawfully, prior to the Motor Carrier Act, is not exempt from the application of section 210 when he appears before the Commission seeking authority based on his "grandfather" rights. It certainly could not have been the intent of Congress to exempt those individuals who were so fortunate as to have been engaged in both types of operation prior to the act through the medium of separate corporations.

Applicant's counsel argue that even if it were one and the same person as the common carrier company (which they contend is not the case), the holding of both forms of authority by the two companies would be consistent with the public interest and the policy declared in section 202(a) of the act. The examiner is unable to agree with this argument. It is true that the application is supported by rep- [fol. 342] resentatives of shippers who have used, and are desirous of continuing to use applicant's service as a contract carrier, but this does not overcome the potentiality of discrimination which always must be present when the same individuals are in position to offer both kinds of

service in respect of the same commodities and between the same points. Applicant's president solicits traffic for the common carrier company and he conceded that shippers for whom the latter company transports had approached him with reference to entering into contracts with applicant.

In the considered situation, some of the protestants argue that granting any authority to applicant would be inconsistent with the public interest and the policy of the act. Other protestants contend that the operating rights of applicant and the common carrier company should be consolidated as one common carrier operation. In the examiner's opinion neither view should be accepted by the Commission. Both applicant and the common carrier company have "grandfather" rights which should be preserved, so far as this is consistent with observance of section 210. The discrimination which the section is designed to prevent cannot exist so long as applicant and the common carrier company do not transport the same commodities between the same points. Therefore, it would appear that substantial justice would be done by modifying the authority heretofore granted the common carrier company so as to eliminate authority to haul commodities which applicant is herein found entitled to transport between points common to both carriers. The common carrier company can request such modification, under section 212 (a) of the act. However, if it is unwilling to do so the two proceedings should be reopened and consolidated for such further action as may be necessary.

[fol. 343] The examiner finds that applicant was on July 1, 1935, and continuously since has been, engaged in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce of (a) alcoholic liquors and beverages, from Louisville, Lawrenceburg and Terre Haute to points and places in Indiana and Illinois, and to Cincinnati, Ohio; (b) empty bottles and other liquor distilling supplies from Terre Haute and Indianapolis to Louisville, Lawrenceburg, and Cincinnati; (c) canned and preserved food products from Indianapolis to Cincinnati and Chicago; (d) packing-house products and meats from Chicago to Indianapolis, and (e) waste-paper board from, Indianapolis to Chicago, over irregular routes.

The examiner further finds that applicant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle, are

controlled and managed in a common interest, and that the holding of a permit by applicant authorizing transportation of commodities which said common carrier is authorized to transport, between points common to the two carriers, has not been shown to be consistent with the public interest and the policy declared in section 202(a) of the act.

The examiner further finds that upon compliance by applicant with sections 215 and 218 of the act and the Commission's rules and regulations thereunder, and upon the appropriate modification of the authority heretofore granted said Ziffrin Truck Lines, Inc., so as to eliminate authority to transport commodities transported by applicant between points served by both carriers, an appropriate permit should be granted applicant, and the application denied in all other respects.

The appended order should be entered.

(Signature) H. C. Lawton, Examiner.

[fol. 344] APPENDIX

Ziffron Truck Lines, Inc., was authorized to transport general commodities, except livestock, explosive, inflammable articles, commodities in bulk and those of unusual value between the following points and over the following routes:[5]

Between Plymouth, Ind., and Louisville, Ky., and intermediate points over U. S. Highway 31 via Indianapolis to its junction with U. S. Highway 31W and 31E and thence to Louisville over either of latter highways serving Tipton, Ind., and as an off-route point.

Between Chicago, Ill., and Cincinnati, Ohio, including intermediate points over the highways between those points described in route 2a of appendix 2. Between Riverdale, Ill., and Whiting, Hammond, and Gary, Ind., on the one hand, and U. S. Highway 41, on the other, over city streets.

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[5] The appendix 2 referred to in connection with certain of the above highways will be found in the report and order in *Ziffron Truck Lines, Inc., Common Carrier Application, supra*. The above appendix is for the purpose of indicating the points involved in the cited proceeding.

Between Cincinnati, Ohio, on the one hand and Newport and Covington, Ky., on the other over city streets between those points.

Between Indianapolis and Cincinnati including intermediate points as follows: (a) Between Indianapolis and the junction of U. S. Highway 52 and Indiana Highway 44 over U. S. Highway 52, thence over Indiana Highway 44 to junction with Ohio Highway 27 and thence over latter highway to its junction with Ohio Highway 128 and thence over the latter highway to Cincinnati. (b) Between Indianapolis and the junction of U. S. Highways 40 and 35 over U. S. Highway 40 thence over U. S. Highway 35 to Eaton, Ohio, thence over Ohio Highway 122 to Middletown, Ohio, and thence to Cincinnati over (1) Ohio Highway 4 or (2) Ohio Highway 4 to Hamilton, Ohio, and thence over Ohio Highway 127 to Cincinnati.

Between Chicago and Indianapolis but not including intermediate points as follows: (a) Over U. S. Highway 41 to its junction with U. S. Highway 30, thence over U. S. Highway 30 to its junction with U. S. Highway 152, thence over latter highway to La Fayette, Ind., thence over Indiana Highway 43 to Crawfordsville, Ind., and thence over Indiana Highway 34, and (b) Over Illinois Highway 1 to its junction with U. S. Highway 36 and thence over the latter highway to Indianapolis.

[fol. 345] Between Joliet, Ill., and Plymouth, Ind., but not including intermediate points, over U. S. Highway 30.

Between the junction of U. S. Highway 31 and Indiana Highway 38, on the one hand and the junction of Indiana Highways 1 and 44 on the other, but not including intermediate points, over Indiana Highway 38 to its junction with Indiana Highway 1 and thence over the latter highway to its junction with Indiana Highway 44.

Between Indianapolis and Peoria, Illinois, but not including intermediate points as follows: Between Indianapolis and the junction of Illinois Highway 10 and Indiana Highway 34 over Indiana Highway 34. Between the junction of Indiana Highway 34 and Illinois Highway 10 and Danville, Ill., over Illinois Highway 10. Between the junction of Indiana Highway 34 and Illinois Highway 10 and Danville, Ill., over Illinois Highway 10. Between Danville and Peoria over U. S. Highway 150.

Between the junction of U. S. Highway 150 and Illinois Highway 9 and Pekin, Ill., but not including intermediate

points, over Illinois Highway 9 to its junction with Illinois Highway 24 and thence over the latter highway to Pekin.

Between Indianapolis and Muncie, Ind., and intermediate points over U. S. Highway 67.

Between the junction of U. S. Highway 40 and 35 and Greenville, Ohio, but not including intermediate points over U. S. Highway 40 to its junction with U. S. Highway 127 and over latter highway to Greenville.

Between Joilet, Ill., and the junction of U. S. Highways 30 and 152 but not including intermediate points over U. S. Highway 30.

Between Indianapolis and Evansville, Ind., and intermediate points, as follows: Between Indianapolis and Marshall, Ill., over U. S. Highway 40 including the off-route point of Greencastle, Indiana. Between Marshall and Lawrenceville, Illinois, over Illinois Highway 1. Between Lawrenceville and Vincennes, Ind., over U. S. Highway 50. Between Vincennes and Evansville over U. S. Highway 41.

Between Indianapolis and Vincennes and intermediate points over Indiana Highway 67, including the off-route point of Martinsville, Ind.

Between Indianapolis and Fort Wayne, Ind., and intermediate points over Indiana Highway 9 to its junction with U. S. Highway 24, thence over the latter highway to Fort Wayne, serving the off-route point of Elwood, Ind., over Indiana Highway 28 and the off-route point of Frankton, Ind., over said Indiana Highway 28 and an unmarked county highway.

Between Oxford and Cincinnati, Ohio, and intermediate points as follows: Between Oxford and Franklin, Ohio, over Ohio Highway 73 to junction with U. S. Highway 25 and thence over the latter highway to Franklin. Between Franklin and Cincinnati over U. S. Highway 25.

[fol. 346] Recommended by H. C. Lawton, Examiner.

(Signature) H. C. Lawton.

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the — day of — A. D. 1939.

No. MC-2511

ZIFFRON, INCORPORATED, CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made and said application upon due notice having been heard by H. C. Lawton, Examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted.

It is ordered, That upon full compliance with sections 215 and 218 of the Motor Carrier Act, 1935, and with the rules and regulations of the Commission thereunder, and upon the appropriate modification of the authority heretofore granted Ziffron Truck Lines, Inc., as provided in the findings of said report, a permit be issued Ziffron, Incorporated, of Indianapolis, Ind., authorizing the continuance of operation as a contract carrier by motor vehicle in interstate or foreign commerce of the commodities between the points specified in said report, over irregular routes.

It is further ordered, That the above-described permit shall be issued upon the condition that operations thereunder shall be conducted in accordance with all rules, regulations and requirements relating thereto, issued by the Commission under the Motor Carrier Act, 1935.

And it is further ordered, That in all other respects said application be, and it is hereby denied, effective

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fols. 347-365] REPORT AND ORDER OF THE COMMISSION, DATED MAY 29, 1941, OMITTED. PRINTED SIDE PAGE 20, ANTE

[fol. 366] [Stamp:] Received Jul. 8, 1941, Section of Dockets

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-2511

ZIFFRIN INCORPORATED CONTRACT CARRIER APPLICATION
Indianapolis, Ind.

Present: William E. Lee, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled matter; and good cause appearing:

It is ordered, That the order of the Commission entered herein on May 29, 1941, which by its terms denies the application, effective July 15, 1941, be, and it is hereby, modified to the extent that such denial order is to become effective October 15, 1941.

Dated at Washington, D. C., this 2nd day of July, A. D. 1941.

By the Commission, Commissioner Lee.

W. P. Bartel, Secretary.

[fol. 367] [Stamp:] Received Oct. 2, 1941, Section of Dockets

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-2511

ZIFFRIN INCORPORATED CONTRACT CARRIER APPLICATION
Indianapolis, Ind.

Present: William E. Lee, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled matter; and good cause appearing:

It is ordered, That the order of the Commission entered herein on May 29, 1941, which by its terms as thereafter modified denies the application, effective October 15, 1941,

be, and it is hereby, modified to the extent that such denial order is to become effective November 5, 1941.

Dated at Washington, D. C., this 27th day of September, A. D. 1941.

By the Commission, Commissioner Lee.

W. P. Bartel, Secretary.

[fols. 368-369] Order of the Commission Dated Sept. 29, 1941, Omitted. Printed Side Page 57, ante.

[fol. 370] Before Interstate Commerce Commission

Docket No. MC 2511

(Form BMC 1)

In the Matter of the Application of Ziffrin, Incorporated, of 1231 West Morris Street, Indianapolis, Indiana, for a Certificate of Public Convenience and Necessity or Permit (Form BMC 1), Authorizing operation as a Common or Contract Carrier by Motor Vehicle in the Transportation of Commodities Generally, in Interstate Commerce, between Points Located in the States of Indiana, Illinois, Ohio, Pennsylvania, New York, Iowa, Kentucky, Missouri, Wisconsin and West Virginia, over Irregular Routes.

Indianapolis, Indiana, September 12, 1938, 9 a. m.

Before H. C. Lawton, Examiner, Interstate Commerce Commission.

Met pursuant to notice.

Appearances:

Howell Ellis, 520 Illinois Building, Indianapolis, Indiana, and

L. C. Loughry, 11 South LaSalle Street, Chicago, Illinois, appearing for applicant.

Edward Gusky, New York, New York, appearing for Schenley Products Company, New York.

M. F. Chandler, Columbus Building, Louisville, Ken-
[fol. 371] tucky, appearing for Kentucky Liquor Producers Traffic Association and Frankfort Distilleries, Inc., Louisville, Kentucky.

Frank H. Luther, Jos. E. Seagram & Sons, Inc., 7th Street Road, Louisville, Kentucky, appearing for Jos. E. Seagram & Sons, Calvert Distilling Company and Carstairs Brothers Distilling Company.

O. R. Livinghouse, 617 Bankers Truck Building, Indianapolis, Indiana, appearing for Central Freight Association and Southern Freight Association Rail Carriers.

David Axelrod, and

Jack Goodman, 10 South LaSalle Street, Chicago, Illinois, appearing for Peoria Cartage Company, Decatur Cartage Company, Hayes Freight Lines, Incorporated, H. J. Tobler Transfer, Incorporated, Dohrn Transfer Company, Hall Freight Lines, Incorporated, Scherer Bros. Transfer & Storage Company, Rock Island Transfer & Storage Company.

F. D. Norviel, 310 Terminal Traction Building, Indianapolis, Indiana, appearing for (I. R. R.) Bowman Elder, Receiver, and Indiana Railroad.

F. F. Gilbert, care of Swift & Company, Chicago, Illinois, appearing for Swift & Company.

P. E. Perry, Chicago, Illinois, appearing for Kraft Phenix Cheese Corporation.

B. W. LaTourette, 314 North Broadway, St. Louis, Missouri, appearing for American Trucking Association, In-
[fols. 372-374] corporated (Common Carrier Division), Anderson Motor Service Company, et al.

R. W. Brunow, 216 East Pearl Street, appearing for Silver Fleet Motor Express, Incorporated.

W. K. Thomas, Louisville, Kentucky, appearing for Reliance Trucking Company.

E. L. Belimer, 617 Bankers Trust Building, Indianapolis, Indiana, appearing for Central Freight Association and Southern Freight Association rail carriers.

[fol. 375] PROCEEDINGS

Exam. Lawton: Will you come to order, gentlemen? I wish to direct your attention to the Commission's rules forbidding smoking in the hearing room at any time. The Commission has assigned for hearing at this time and place

Docket No. MC 2511, being the application of Ziffrin, Incorporated, of 1231 West Morris Street, Indianapolis, Indiana, for a permit as a contract carrier by motor vehicle transportation of commodities generally in interstate commerce between points in the states of Indiana, Illinois, Ohio, Pennsylvania, New York, Iowa, Kentucky, Missouri, Wisconsin, and West Virginia over irregular routes. In stating your appearances, those of you who have not been admitted to practice before the Commission's bar, please so state. Who appears for the applicant?

Mr. Ellis: For the applicant, L. C. Loughry, attorney at law, Chicago, Illinois; and Howell Ellis, attorney at law, 520 Illinois Building, Indianapolis, Indiana. Both Mr. Loughry and myself are registered practitioners before the Interstate Commerce Commission. Mr. Loughry is to my right, and my name is Ellis.

Exam. Lawton: Are there any appearances other than those for the applicant?

(No response.)

Exam. Lawton: We will take the appearances for protestants.

[fol. 376] Mr. LaTourette: B. W. LaTourette, 314 North Broadway, St. Louis, Missouri, appearing for American Trucking Association, Incorporated (Common Carrier Division). This is a division of common carriers within the American Trucking Association, Incorporated. They appear in this case to protect the interests of common carriers as said interests may appear. I also appear individually for the following carriers: Anderson Motor Service Company; Be-Mac Transport Company, Incorporated; Brashear Freight Lines, Incorporated; Capitol Freight Lines, Ltd.; Consolidated Forwarding Company, Inc.; Great Central Transport Corporation; Highway Merchandise Carriers, Inc.; Husmann & Roper Freight Lines, Inc.; Inter-State Motor Freight System; Kelleher Carloading & Distributing Company; Mound City Forwarding Company, Inc.; Nighthawk Freight Service, Incorporated; Plaza Express Company, Inc.; Powell Brothers Truck Lines, Inc.; Prairie State Motor Freight Company; St. Louis Forwarding Company, Inc.; Spector Motor Service, Incorporated; Viking Freight Company, Inc. The latter named carriers are common carriers operating in the gen-

eral territory described in the application and they appear in this proceeding as protestants.

Mr. Ellis: May it please the Examiner, of course, we have no objection to the appearance of Mr. LaTourette for these interested parties that he has last named, but we want to call to the attention of the Examiner and the Com- [fol. 377] mission that this is a case involving the operating rights of an individual operator. Only those who can be interested are other operators. We think that any appearance purported to be made on behalf of the American Trucking Association in this case is wholly out of place; that they are not interested in this matter, and in connection with that I would like to remind the Examiner and Mr. LaTourette that we are members of the American Trucking Association just as well as those whom he represents.

Exam. Lawton: In other words, you think it is a case of a house divided against itself?

Mr. Ellis: That is right.

Exam. Lawton: Your remarks will be taken under consideration.

Mr. Goodman: David Axelrod and Jack Goodman, 10 South LaSalle Street, Chicago, Illinois, appearing for the Peoria Cartage Company, Decatur Cartage Company, Hayes Freight Lines, Inc.; H. J. Tobler Transfer, Incorporated; Dohrn Transfer Company; Hall Freight Lines, Inc.; Scherer Bros. Transfer & Storage Company, and Rock Island Transfer & Storage Company. Both Mr. Axelrod and myself are registered to practice before the Interstate Commerce Commission. I will like to have you note Mr. Axelrod's absence, however, I expect he will be here tomorrow.

Exam. Lawton: Any additional appearances?

[fol. 378] Mr. Livinghouse: Mr. Examiner, I would like to have the appearance of O. R. Livinghouse entered, 617 Banker's Trust Building, Indianapolis, Indiana, appearing for Central Freight Association and Southern Freight Association rail carriers. Mr. E. L. Belimer of the same address is appearing with me. Both of us have been admitted to practice before the Interstate Commerce Commission.

Exam. Lawton: Both of you present?

Mr. Livinghouse: My name is Livinghouse, and Mr. Belimer will be here in just a few minutes.

Mr. Norviel: F. D. Norviel, 310 Terminal Traction Building, Indianapolis, Indiana, appearing for the Indiana Railroad, and Bowman Elder. I am qualified to practice before the Interstate Commerce Commission.

Mr. Chandler: M. F. Chandler, Columbus Building, Louisville, Kentucky, appearing for and in behalf of the applicant and the Kentucky Liquor Producers Traffic Association of Louisville, Kentucky representing some twenty-eight distilleries within the state of Kentucky.

Mr. Luther: Frank H. Luther, in support of the application, appearing for Jos. E. Segram & Sons, Incorporated, Calvert Distilling Company, Carstairs Brothers Distilling Company. I am a practitioner, and general traffic manager of those companies.

Mr. Gusky: Edward Gusky, appearing for general traffic [fol. 379] manager, Schenley Products Company, and its subsidiaries located at Lawrenceburg, Indiana, Lexington, Kentucky, Covington, Frankfort, Kentucky, and Schenley, Pennsylvania.

Mr. Perry: P. E. Perry, appearing for the Kraft-Phenix Cheese Corporation on behalf of the Ziffrin Truck Lines. I am not a registered practitioner.

Mr. Gilbert: F. F. Gilbert, assistant to the traffic manager, Swift & Company, for the applicant.

Mr. Brunow: R. W. Brunow, 216 East Pearl Street, Louisville, Kentucky, appearing for Silver Fleet Motor Express, Incorporated.

Mr. Thomas: W. K. Thomas, Louisville, Kentucky, appearing for Reliance Trucking Company.

Exam. Lawton: If there are no more appearances, applicant may proceed.

Mr. Ellis: May I now address myself to the Examiner, on the record.

Exam. Lawton: Yes, sir.

Mr. Ellis: The notice of hearing in this matter indicates that there are two separate and distinct issues involved in this hearing according to said notice; first, the rights of the applicant, Ziffrin, Inc., as a contract carrier under the grandfather clause of the Motor Carrier Act of 1935; second, certain matter set out in the notice of the Commission in connection with the corporate relationship exist- [fol. 380] ing between the applicant, Ziffrin, Inc., and Ziffrin Truck Lines, Inc. It is the suggestion of the applicant that the first matter be taken up first, and that

testimony in the first instance be confined to the grandfather clause claims and rights of the applicant, that when the Commission and the protestants have completed that phase of the case and the applicant of course, that we then turn to the second phase of the case involving this alleged corporate relationship between the applicant and the Ziffrin Truck Lines, Inc. I make that suggestion for the purpose of clarity in the record. I would make it only for that purpose, and would appreciate hearing the views of the Examiner, and any other parties in reference thereto.

Exam. Lawton: I have no suggestion as to the procedure. Whatever suits the convenience of the parties, all right, but I would like to have each part of the record devoted to one complete subject, rather than part of it here and part of it there. If you can handle it in that way, you will have a record that is much easier to study, and you will get a report much quicker. I would be glad to hear from protestants on that point.

Mr. LaTourette: I see no objection to that particular method of procedure, Mr. Examiner. It is the understanding, of course, that we shall not be limited in any of our cross-examination to show the relation of any claimed rights [fol. 381] or points to be served by the contract carrier, Ziffrin, Inc., which might be related in some way with rights of the Ziffrin Truck Lines, Inc. In other words, we do not want to be limited in cross-examination at the conclusion of the grandfather hearing on the theory that we must await the development of the corporate relationship, if there is any, between these two carriers.

Exam. Lawton: It has just occurred to me it might be somewhat difficult to separate the issues on that, even if it were. We have a duplication of witnesses and testimony, assuming that applicant is going to first justify the right of the permit. Then, it is going to establish the justification for a permit in view of the relation with the other carrier, if there is any such relation. What is your thought on that, Mr. Ellis?

Mr. Ellis: Our suggestion was made, Mr. Examiner, and I am sure that you and Mr. LaTourette will view it the same way, it is in perfectly good faith. It is an attempt to make this just as easy as possible. If the Examiner or any of the parties feel it would be best to attack the whole problem at once, we will do so. I have some remarks that I propose to make for the record before the second

section of this case is heard, and I had proposed to defer them but if it is the purpose of the Commission and the thought of the Examiner that we could best serve the in-
[fol. 382] terests for all concerned by taking it up in its entirety, I take it we have no objection. Is that right, Mr. Loughry?

Mr. Loughry: No. I think the record would be much clearer if these two issues are divided.

Exam. Lawton: We might attempt to segregate the issues; if it becomes apparent that it can't be done without undue duplication, then we can change the order of our procedure.

Mr. LaTourette: Yes, I think, Mr. Ellis, I could agree with you. We should conserve the time. I do not want to place myself so as to be limited in cross-examination after the completion of certain direct testimony, with the thought that that cross-examination relates rather to the affiliation, if there is any affiliation, then have to defer that cross-examination until further direct examination.

Exam. Lawton: As the Examiner sees it, it is impossible definitely to rule on the thing. We might attempt to go along *along* the line suggested by applicant's counsel, and if it becomes apparent that we cannot continue in that way, why we will give up that thought and Mr. Ellis can then make those remarks that he referred to.

Mr. Ellis: In that connection, I want to say I do not want to be placed in the position of having to object to questions on the part of protestants on cross-examination. If, for example, we decide to proceed along this line, the protestants should ask Mr. Ziffrin, on his cross-examination, [fol. 383] what is the relationship between these two companies, I would feel disposed to object because I want to develop that on direct examination, rather than in that manner. My only thought is to facilitate the progress of these proceedings. With that in mind, we will attempt, at least, to proceed on the grandfather clause right of the applicant. If the applicant feels at any time we should abandon that procedure, an indication to the effect will be speedily complied with by the applicant.

Exam. Lawton: Very well, then, we will proceed.

Mr. Ellis: Directing my attention then, to the grandfather clause feature of this matter, I want to state for the record, that the territory included in the application includes more territory than we are going to ask from the Commission

at this time, but the territory which the applicant will insist on in this hearing it is entitled to under the grandfather clause, consists of that part of the state of Kentucky within a radius of approximately 150 miles from the city of Louisville, all of the state of Indiana——

Mr. LaTourette: Just one minute, Mr. Ellis. 150 miles from Louisville?

Mr. Ellis: That is, approximately, Mr. LaTourette.

Mr. LaTourette: Then, all of Indiana?

Mr. Ellis: All of Indiana, all of the state of Ohio, all of the state of Illinois, St. Louis, Missouri, Milwaukee, [fol. 384] Wisconsin, and points in the state of Wisconsin intermediate between Milwaukee and Chicago, and that part of the state of Pennsylvania in and around the city of Pittsburgh and Schenley, Pittsburgh. The entire territory included in the application will not be made the subject of proof by the applicant, and it is our desire to limit our proof to the territory described which is all included in the application, and the effect of the territorial description made would be ~~to limit the issue~~s rather than to enlarge them.

Exam. Lawton: With the understanding that the issues are limited, and the scope narrowed the amendment will be allowed.

Mr. LaTourette: May I inquire of counsel with reference to St. Louis, Missouri? Does that deal with the claim to and from the points in all of the states, or portions of the states that have been mentioned?

Mr. Ellis: Yes, sir.

Mr. LaTourette: May I further inquire as stated on page 1 of the application, the claim is for the transportation of commodities generally?

Mr. Ellis: Well, that will develop, from the evidence, Mr. LaTourette.

Mr. LaTourette: I see.

Exam. Lawton: Off the record.

(Discussion outside the record.)

[fol. 385] Mr. Ellis: Mr. Examiner, may I say——

Exam. Lawton: There is also involved the question of the affiliation of the applicant and the Ziffrin Truck Lines, Incorporated, and in the event of such affiliation the question of whether applicant may hold a permit consistently

with the public interest, and the policy of the Act within the meaning of Section 2103. All right, your first witness?

Mr. Ellis: Did you desire to have them all sworn at once, or singly, Mr. Examiner?

Exam. Lawton: Singly.

Mr. Ellis: Mr. Ziffrin.

SAM ZIFFRIN, was sworn and testified as follows:

Direct examination.

By Mr. Ellis:

Q. State your name.

A. Sam Ziffrin.

Q. Where do you reside, Mr. Ziffrin?

A. 5631 Washington Boulevard, Indianapolis, Indiana.

Q. Do you have any connection with the applicant in this case, Ziffrin, Inc.?

A. I have.

Q. What is that connection?

A. President and general manager.

Q. I wish you would state for the record whether or not the applicant, Ziffrin, Inc., is a corporation?

[fol. 386] A. It is.

Q. State whether or not it is organized under and existing by virtue of the law of the state of Indiana?

A. It is.

Q. State when it was incorporated, Mr. Ziffrin? And in that connection, if you do not recall the exact date, you may refresh your memory from any memorandum you have there with you.

A. It was incorporated in December, 1933.

Q. I wish you would state whether or not since the time of its incorporation, the applicant, Ziffrin, Inc., has been engaged in business as a contract carrier of property by motor vehicle in interstate commerce?

A. It has.

Q. I will ask you whether or not, Mr. Ziffrin, the applicant, Ziffrin, Incorporated, filed an application with the Interstate Commerce Commission under the so-called grandfather clause of the Motor Carrier Act of 1935, seeking authority from said Commission to continue its operations as a contract carrier of property by motor vehicle in inter-

state commerce, in which the applicant was engaged July 1, 1935, and has been engaged in since that time?

A. He did.

Q. And is that application which is in hearing now before the Examiner and the Commission?

[fol. 387] A. It is.

Q. After the Motor Carrier Act became effective, and the various rules and regulations of the Commission concerning carriers were promulgated, I will ask you whether or not first, you filed with the Interstate Commerce Commission a schedule of minimum rates as required by contract carriers?

A. We have.

Q. I will ask you whether or not also pursuant to those rules and regulations you filed with the Interstate Commerce Commission the contracts which you have with certain shippers?

A. We have.

Q. Has the applicant, Ziffrin, Incorporated, to the best of your knowledge and belief, complied with all of the rules and regulations of the Interstate Commerce Commission affecting contract carriers by motor vehicle engaged in interstate commerce promulgated by said Commission since the effective date of the Motor Carrier Act?

A. It has.

Q. Directing your attention, Mr. Ziffrin, to that period on or about July 1, 1935, I will ask you whether or not before July 1, 1935, on or about, and continuously since that date, the applicant, Ziffrin, Inc. has been operating as a contract carrier by motor vehicle engaged in interstate commerce?

A. It has.

Q. Mr. Ziffrin, in what territory generally, describing it, [fol. 388] if you please, has the applicant, Ziffrin, Inc. operated as a contract carrier in interstate commerce by motor vehicle on or about July 1st, 1935, and since that time?

A. In the states of Indiana, Ohio, Illinois, St. Louis, parts of Kentucky, and parts of Wisconsin, at Pittsburgh, and Schenley, Pennsylvania. That is up until—I want to clarify that a little bit. That was up until August, 1937.

Q. Wait just a minute. From July 1, 1935, up to August, 1937, you had operated in that territory and operated continuously in it, is that correct?

A. Until August, 1937, that is right.

Q. Now, Mr. Ziffrin, I will ask you whether or not, along about August, 1937, the Interstate Commerce Commission, reviewed your grandfather application, that is, the grandfather's clause application of Ziffrin, Inc., as was its procedure in many other cases under District Supervisor, one Luther Snodgrass, located in the city of Indianapolis?

A. It did.

Q. Did Mr. Snodgrass summons you to his office and fix a certain time or place when you could and would be required to present evidence as to the grandfather clause operations of Ziffrin, Inc.?

A. He did.

Q. Did you at the time and place fixed by Mr. Snodgrass appear before him and submit such proof?

[fol. 389] A. I did.

Mr. Goodman: Objection. Let us not go into the informal hearing before the Interstate Commerce Commission. This case has been reopened for a formal hearing, and any reference to that is going to be objectionable.

Mr. Ellis: We certainly have a right to tell what the Interstate Commerce Commission did.

Exam. Lawton: This is of a general nature so far. Proceed.

Mr. LaTourette: What has been done before Mr. Snodgrass, Mr. Examiner, I don't believe has any particular value in this case now. It has been opened for a formal hearing. That is what we are into.

Exam. Lawton: He has not got to that point yet. He simply asked him if he appeared before Mr. Snodgrass.

Mr. LaTourette: He asked if he submitted any evidence.

Exam. Lawton: I will permit the question and answer.

By Mr. Ellis:

Q. Have you answered it, Mr. Ziffrin?

A. I did. In case I have not, I will say I did submit all of the evidence that Mr. Snodgrass requested.

Q. After that evidence was submitted at the request of Mr. Snodgrass, did you confer with him about this matter?

A. I did.

Q. Did you at the request of Mr. Snodgrass enter into an agreement in writing, signed by you, as to the grand-

[fol. 390] father clause rights which you would be willing to accept for Ziffrin, Incorporated?

A. I did.

Q. Do you have that document with you?

A. I have.

Q. I wish you would produce it, please.

Exam. Lawton: Let us see it.

Mr. LaTourette: Of course, we will be given an opportunity to be heard before any testimony is adduced seeking to put such matters into the record.

Mr. Ellis: Mark this applicant's exhibit No. 1.

(Applicant's exhibit 1 marked for identification.)

By Mr. Ellis:

Q. I call your attention, Mr. Ziffrin to a paper which for the purpose of identification has been marked by the reporter, applicant's exhibit No. 1. I will ask you to state whether or not that is the agreement which was heretofore testified about, which you entered into with Mr. Snodgrass?

A. It is.

Q. Is it signed by you?

A. It is.

Q. On what date?

A. On August the 23rd, 1937.

Q. Did that agreement with Mr. Snodgrass include all of the grandfather clause rights which you, as president [fol. 391] of the applicant feel that Ziffrin, Incorporated was or is entitled to?

Mr. LaTourette: Just a minute. I object to that on the ground it is invading the province of the Commission What the applicant believes he is entitled to is not controlling in this case. It is simply a self-serving instrument, a self-serving declaration, rather.

Exam. Lawton: I think he has already brought out the fact that he agreed to accept certain territory. I will permit the answer.

By Mr. Ellis:

Q. Will you answer the question. Do you understand it?

A. May I have the question again?

Mr. Ellis: Read it back, Mr. Reporter.

(Question read.)

The Witness: It did not.

By Exam. Lawton:

Q. By that you mean that you believed, and then believed you were entitled to the same territory?

A. Yes, sir.

Q. Is that right?

A. That is correct.

By Mr. Ellis:

Q. Mr. Ziffrin, did Mr. Snodgrass insist that you accept this definition of your rights included in the paper which has been marked exhibit 1?

Mr. LaTourette: We object to that, Mr. Examiner. [fol. 392] These parties can't be bound by any such statement in the absence of having an opportunity to cross-examine and protect their interests.

Mr. Ellis: Whether you are bound by that——

Exam. Lawton: Just a minite, gentlemen. Let us not have any argument about this. This line of questioning is clearly, I might say, embarrassing to an official or an employe of the Commission. I don't believe this is the proper place to bring that in.

Mr. Ellis: I may say, Mr. Examiner——

Exam. Lawton: Off the record.

(Discussion had outside the record.)

Mr. Ellis: Back on the record.

By Mr. Ellis:

Q. In any event, Mr. Ziffrin, is it now a fact that you are now appearing before the Commissioner and this Examiner in public hearing, seeking to establish by competent evidence, that Ziffrin, Incorporated, the applicant herein, is entitled to its grandfather clause rights in that territory which has been described by your counsel in amending the application which has been verified by you under oath?

A. That is correct.

Q. Mr. Ziffrin, following the signing of that agreement with Mr. Snodgrass and the subsequent time during which the Commission had it under advisement, and on and after the time the Commission entered the compliance order, I [fol. 393] will ask you whether or not you confined your operation to that territory, to those commodities, and to

such other limitations as are described in the agreement and in the compliance order which was dated in March, 1938?

A. I did, and immediately canceled some previous contracts, which is a matter of record with the Commission.

Q. Mr. Ziffrin, excepting that limitation of your service or the service of the applicant which occurred after August, 1937, as the result of the agreement heretofore agreed to, has the service of the applicant in the territory heretofore described been continuous upon the demand of shippers with whom the applicant has contracts since July 1, 1935, down to this time?

A. It has.

Q. Mr. Ziffrin, I wish you would state for the record, generally speaking, what commodities the applicant was transporting in interstate commerce by motor vehicle in the territory heretofore described on or about July 1, 1935?

A. Canned, preserved and prepared foods, packing house products and fresh meats, alcoholic liquors and distillers' supplies, including bottles, milk, condensed and evaporated, dairy products, including ole-margarine, cheese and its by-products, paper products and paper articles, shoe polish and dressing; and we did haul batteries and steel but we canceled those products.

Q. Have you continued to haul in interstate commerce [fol. 394] under contract the commodities just enumerated down to and including the present time?

A. With the exception of batteries and steel, yes, sir.

Q. Directing your particular attention to the question of the transportation of alcoholic liquors, I will ask you approximately when did the applicant, Ziffrin, Inc. first begin the transportation of alcoholic liquors, malt liquors, distillers' supplies, and those allied articles?

A. I believe I hauled the first case of liquor that was ever shipped when the sale of liquor and the manufacturing of liquor was legalized. That was back in 1934.

Q. And have you continued to transport those products in interstate commerce since that time?

A. We surely have.

Q. Has the transportation of these liquors themselves been from the distilleries, warehouses, and places of storage and so forth, to distribution points?

A. Yes, sir.

Q. Have there, however, been also return movements of liquors to the distilleries, warehouses, sources of supply?

A. Yes, sir, and there also is a movement of bulk liquors between one plant and another plant. At times there are movements from the different warehouses back into the territory. For instance, when the whiskey first started to be manufactured, a great portion of it went into Chi- [fol. 395] cago. Then, it was shipped out of Chicago back into the territory. That made it a little bit closer to the distillery than Chicago was.

Q. Drawing your attention now to the distillers' supplies, does that include bottles, various things?

A. Bottles, labels, glue, caps, everything that goes into the package, complete package, and ingredients, in some cases like cherry wine that goes into the manufacture of liquor.

Q. Have those movements been from the various points of origin, manufacture and distilleries, to places of manufacture of liquor?

A. Yes.

Q. Have the movements of these liquors and the allied associated supply products, as well as all of the commodities concerned, which you have testified been generally in both directions throughout this territory?

Mr. LaTourette: We are going to object to this line of testimony unless it is further supported. I have no objection to it going in this way with the understanding we are not bound insofar as this testimony is conclusive of operations.

Exam. Lawton: Whenever an operation is put in issue, I think it is generally understood now to be the rule it must be supported by some documentary evidence. I take it you are going to support this operation by such evidence, are you not, Mr. Ellis?

Mr. Ellis: We are going to support this operation by [fol. 396] such evidence, Mr. Examiner, as we deem competent. At this time we are offering the sworn testimony of the applicant as to what he did. We are not attempting to bind Mr. LaTourette or anybody else, but we think it is proper testimony for whatever weight the Commission will see fit to give it.

Exam. Lawton: It will be accepted on that understanding.

Mr. Ellis: Will you read the last question.

(Question read.)

The Witness: Fairly general.

By Mr. Ellis:

Q. Mr. Ziffrin, I believe you testified that you were of the opinion that you moved the first consignment of whiskey by motor vehicle, that was moved after the repeal of the 18th Amendment.

A. Yes, sir.

Q. Was that at the time that the distilleries and breweries and other distributing agencies of the country were just resuming their operations for the sale of their merchandise throughout the United States.

A. Yes, sir.

Q. Was that at the time when the transportation of liquors by motor vehicle was in a pioneering stage?

A. Yes, sir, that was at the time when the handling of whiskey started out a little bit later. That is, the shipping of whiskey started later than beer, but it is a matter of [fol. 397] record here in the state of Indiana—

Mr. LaTourette: We are going to object to what the records of Indiana show. This witness is not qualified. The record will be the best evidence.

The Witness: Every bottle of beer that came into the state of Indiana from points such as Milwaukee, St. Louis, Louisville, Columbus, Dayton, Ohio, Cincinnati, we brought in every bottle of beer that came in to the state of Indiana, over the entire state of Indiana.

Mr. LaTourette: I am going to move that all be stricken, as a self-serving statement unsupported by any proof other than the statement of the witness himself.

Mr. Ellis: Do you think the witness is lying about it, Mr. LaTourette?

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Proceed on the record.

By Mr. Ellis:

Q. Mr. Ziffrin, I will ask you whether or not it is a fact that after repeal and when the state of Indiana legalized

the sale of liquor in this state, that liquor dealers and beer dealers throughout this state to your personal knowledge received their first shipments of these commodities by way of your line, Ziffrin, Incorporated?

Mr. LaTourette: Just a minute. We object to that statement on the same ground. It is very general in its nature, [fol. 398] can't be proven by any operation, and furthermore it is not properly supported. We move it be stricken, did you not, Mr. Ellis——

Mr. Ellis: Sir?

Exam. Lawton: You meant to ask him if he did not think they received their first shipment?

Mr. Ellis: According to his knowledge. That is all it could be, Mr. Examiner. He could be wrong about it, of course. We are offering it for whatever it could be worth.

Mr. LaTourette: We move to strike it on the ground heretofore stated.

Exam. Lawton: It is very general. It has to be supported by documentary evidence. I will permit it to stand. I want you to be a little more specific. It is entirely too general.

By Mr. Ellis:

Q. Mr. Ziffrin, I wish you would describe for the record just what your company did in making preparation for and in actually transporting alcoholic liquors upon the request of the distilling companies under contract immediately following the repeal of the 18th Amendment?

A. There was a meeting of the major distillers held in the city of New York, and it seems that when whiskey first started to move there was considerable high-jacking taking place. As a matter of fact we lost ourselves, three [fol. 399] loads of liquor in a space of one week. The distillers were not worried so much about the loss of the liquor because they got their money but it created a bad condition in the market in that the price, the prices that the distributors were selling the liquor for was demoralized and it developed that some of this high-jacked liquor would get out of the market and was being sold for less money than the distributors could buy it themselves. So, for that reason they called a meeting and invited me to the meeting and agreed to support me, support Ziffrin, Incorporated, under contract if we would in some way develop a police system,

which we did. The police system is costing us now about $25,000 a year to maintain. It consists of a series of cars all manned by police officers carrying submachine guns, tear gas bombs, working together with the police department, Federal Government and the state police, and the various local civic police, and we have continued that method of conveying to this date, with the result that we enjoy a very major portion of the alcoholic liquor traffic.

Mr. LaTourette: We object to that last statement on the ground it is not supported by proper proof. There is no testimony as to what the total tonnage movement was.

Mr. Ellis: You will find that out.

Mr. LaTourette: I move that the last part of that answer be stricken.

Exam. Lawton: Read that part of it.

[fol. 400] (Answer read.)

Exam. Lawton: That will be considered as a mere conclusion on the part of the witness. No attention will be paid to it.

By Mr. Ellis:

Q. Mr. Ziffrin, I will ask you whether or not you have had compiled and have compiled yourself a partial list of the principal points in the part of this territory where you handled shipments of liquor on, or about July 1, 1935, and continuously down to this time?

A. Yes, sir.

Q. Under contract?

A. Yes, sir.

Q. State what those points were in the state of Illinois, or some of them?

Mr. LaTourette: Just a minute. We are going to make the same objection to this type of testimony on the ground it is no proof of operation. The mere fact that this witness might read a list of points certainly is not evidence that the liquor was transported. It is a self-serving declaration in an attempt to get into this record proof of operation without proper support therefor.

By Exam. Lawton:

Q. From where did you compile that list, Mr. Ziffrin?

A. Off of our books and records.

Q. Is the gentleman who has charge of those books and [fol. 401] records going to testify for you during the course of this proceeding?

A. I had not figured on it, but he can.

Q. I believe he would be the proper person.

A. As a matter of fact, all of these points Mr. Snodgrass had, the documentary evidence.

Exam. Lawton: We are trying the case now. You have to put evidence in differently.

Mr. Ellis: We think, Mr. Examiner, that it is entirely proper for this witness to relate what he did, and that is what we are trying to do at this point, during this examination.

Exam. Lawton: I will only accept that on the condition that you support it by documentary evidence introduced by the witness who has the custody of such evidence. That is customary in grandfather cases. You know that, Mr. Ellis.

Mr. Ellis: Well, is the Examiner allowing the witness to answer? If not, I will pass to something else. What is the ruling?

Exam. Lawton: Proceed. I want you to proceed if you can put that in differently.

Mr. Ellis: You may cross-examine.

Mr. LaTourette: May we have five minutes.

Exam. Lawton: We will have about a five-minute recess.

(A short recess was had.)

[fol. 402] Cross-examination:

Mr. LaTourette: Mr. Examiner, having in mind the method of procedure as suggested by counsel for the applicant, especially with reference to possible violations of this applicant with Ziffrin Truck Lines, Inc. and reserving the right of protestants to cross-examine Mr. Ziffrin at a later stage in the proceeding, and I understand from counsel that Mr. Ziffrin is to testify further at a later stage of this proceeding, and we would have no further cross-examination at this time, except that if the subsequent testimony of Mr. Ziffrin makes it necessary, apparently to cross-examine him as to certain matters that were germane to us under the direct testimony.

Mr. Ellis: Does that apply for all counsel?

Mr. LaTourette: I am only speaking, Mr. Ellis, for those whom I appear for.

Mr. Goodman: I also concur in the remarks that were made by Mr. LaTourrette. I feel that when Mr. Ziffrin is called again and subject to cross-examination, we should be given an opportunity of examining him on the relationship with the Ziffrin Truck Lines, as well as portions that are related to the testimony that was given this morning.

Exam. Lawton: It will be understood that you are waiving none of your cross-examination. Is there any cross-examination at this time.

[fol. 403] (No response.)

Mr. Ellis: You may step down, then, Mr. Ziffrin, unless the Examiner wants to ask you something.

Exam. Lawton: No. I think I will reserve my questions until later also. You are excused for the present, Mr. Ziffrin.

Mr. Ellis: Step down.

(Witness excused.)

Mr. Ellis: Mr. Chandler.

M. F. CHANDLER, was sworn and testified as follows:

Direct examination.

By Mr. Ellis:

Q. Will you state your name, please?
A. M. F. Chandler.
Q. Where do you live, Mr. Chandler?
A. Louisville, Kentucky. The address, do you want the street address?

By Exam. Lawton:

Q. If you will.
A. 1877 Douglas Boulevard, Louisville.

By Mr. Ellis:

Q. If you are connected with any business or manufacturing company, state what that is, and your official capacity?
A. I am general traffic manager of Frankfort Distilleries, Incorporated, with bottling, blending plants and warehouses in Louisville, Kentucky, and Baltimore, Maryland,

[fol. 404] and warehouses located in most the large cities of the United States.

Q. Do the Frankfort Distilleries engage in the manufacture of and sale of alcoholic liquors?

A. We do.

Q. I will ask you whether or not in addition to the duties that you just described to the company, state whether or not you are connected with the Kentucky Liquor Producers Association?

A. I am, I am Vice-President of the Kentucky Liquor Producers Traffic Association who has filed a petition intervening in this case, representing some 25 to 28 various distilleries located in the state of Kentucky and elsewhere.

Q. Will you state what those distilleries are, Mr. Chandler?

A. What the distilleries are?

Q. Yes, and the names of those?

A. The names of the various distilleries, I will submit that to you.

Q. Are you appearing not only on behalf of the Frankfort Distilleries but also on behalf of the Kentucky Producers Liquor Traffic Association?

A. That is correct.

Q. Are the members of that association, as the name would seem to indicate, engaged in the manufacture and sale of alcoholic liquors?

A. I did not hear you.

[fol. 405] Mr. Ellis: Will you read the question?

(Question read.)

The Witness: Surely.

By Mr. Ellis:

Q. I want to direct your attention, Mr. Chandler, to that territory in the United States which includes the portion of the state of Kentucky within a radius of approximately 150 miles of the city of Louisville, the entire state of Indiana, the entire state of Illinois, the entire state of Ohio, St. Louis, Milwaukee, Wisconsin, Pittsburgh and Schenley, Pennsylvania. Do you have that territory in mind?

A. Yes, I have.

Q. I will ask you whether or not referring first to the Frankfort Distilleries, if that company sells and distributes alcoholic liquors in that territory?

A. We do.

Q. Directing your attention to the Kentucky Liquor Producers Traffic Association and the members thereof, I will ask you whether or not those distilleries sell and distribute alcoholic liquors in that territory which you have identified?

A. They do.

Q. I want to direct your particular attention to the applicant in this case, Ziffrin Truck Lines, Incorporated. Are you familiar with that company?

A. I am.

[fol. 406] Q. Do the Frankfort Distilleries have a contract with that company?

A. We did.

Q. And you do now, is that right?

A. No, no, we do not.

Q. Well, what is the situation about that?

A. With Frankfort Distilleries?

Q. Yes.

A. We have signed one. Ours ran out, we have not since made a new one. We intend to.

Q. You intend to?

A. Yes.

Q. Referring to the members of the association of which you are Vice-President, do the members of that association also contract with the applicant, Ziffrin Truck Lines, Incorporated?

A. Many of them.

Mr. LaTourette: Just a moment. We are objecting to that question, of course, on the ground that this witness is not qualified to state whether or not all of these producers have contracts, and on the further ground, the contracts would be the best evidence.

By Exam. Lawton:

Q. Do you know personally?

A. I do, yes, sir, I do. All of the tariffs—I have the tariffs of Ziffrin, Incorporated right with me. It is a matter of record in the tariff who Ziffrin has contracts.

[fol. 407] Q. You have not seen the contracts?

A. I can go further than that.

Q. The tariff?

A. I did see these contracts that I have reference to, yes, sir. I did, because I helped figure the rates on those contracts.

Q. Well——

A. And I saw the signatures of the presidents of the various distilleries on them, on the contracts.

Q. I still don't think that is the best evidence as to those contracts.

A. I am sure Mr. Ziffrin could produce, he could produce them. They are a matter of public record on file with the Commission.

Exam. Lawton: Suppose we confine this witness' testimony to matters of which he has direct knowledge.

Mr. Ellis: I happen to know, Mr. Examiner, that he personally examined the contracts no later than last night, in my presence.

Mr. LaTourette: We object to that voluntary statement of counsel, and move that it be stricken.

Exam. Lawton: No consideration will be paid to it. Please get on with the examination.

By Mr. Ellis:

Q. Well, in any event, Mr. Chandler, I believe you have testified you are here representing that association and its members?

[fol. 408] A. That is correct.

Q. Now, I want to draw your particular attention to the time around or about the repeal of the 18th Amendment to the United States Constitution.

Exam. Lawton: By the way, may be have that date put in the record? I do not believe it has been put in. You mention that.

The Witness: December 3rd, 1933. I believe that is the date. That is subject to correction. I may be wrong.

By Mr. Ellis:

Q. Do you have that time in mind, now, Mr. Chandler?

A. Yes, I have.

Q. I wish you would state for the record and to the Commission just what the situation of your distillery, and members of your Association was at that time in reference to

the manufacture, sale and distribution of your product, particularly by motor vehicle in interstate commerce?

Mr. LaTourette: Just a moment. I don't think it is relevant to ask him that. As I understand it, this is a proceeding under the grandfather clause of the Motor Carrier Act. What condition the distillers were in does not prove any operation by this applicant.

Mr. Ellis: Simply preliminary, leading up to what the applicant did.

Exam. Lawton: He may answer.

[fol. 409] The Witness: At that time, before the Motor Carrier Act of 1935, the various distilleries were confronted with getting their merchandise to various points in the states mentioned, and many truck lines could not furnish us with adequate insurance to protect our merchandise. In other words, they had insurance policies which were absolutely worthless both to themselves, and to the shipper. Also, many trucking lines refused to transport alcoholic liquors saying the risk was too great. It would involve their putting police on escort.

Mr. LaTourette: Now, just a moment, Mr. Examiner. This testimony clearly shows that it has no relation to the issues created by a grandfather application. Apparently it is of the color of testimony seeking to show consistency with the public interest.

Exam. Lawton: I was going to remark, Mr. Ellis, it looks like you are doing the thing that you said you would not do in the first part of this hearing. Can't you combine this testimony to what this man knows of Ziffrin Truck Lines, Incorporated, or Ziffrin, Incorporated?

Mr. Ellis: That is what we are trying to lead up to. Circumstances which resulted in Ziffrin, Incorporated, starting this business for this witness and others.

Exam. Lawton: Try to make it a little shorter.

The Witness: I am making it short.

By Mr. Ellis:

Q. Will you shorten it up, Mr. Chandler?

[fol. 410] A. So, we conferred with Ziffrin, Incorporated, who agreed to give us police protection, and that was the outcome of our contract with Ziffrin, Incorporated.

By Exam. Lawton:

Q. When was this, in December of 1933?

A. No. That was shortly before July 1st.

Q. July 1st?

A. Yes.

Q. What year?

A. 1935. The Motor Carrier Act, I have reference to, shortly before that.

By Mr. Ellis:

Q. Now, directing your particular attention, Mr. Chandler, to July 1, 1935, I will ask you whether or not your company, the Frankfort Distillery, of which you are general traffic manager, used the service of Ziffrin, Incorporated, the applicant in this case, for transportation of alcoholic liquors and distillers supplies in interstate commerce, on before and since July 1, 1935, in the territory you have heretofore identified as being involved in this proceeding.

Mr. LaTourette: We object to that question on the ground it is not the best proof of physical operations by this applicant. The testimony is too general in its nature, and does not inform the parties of the claim made by this applicant as to operations to which it is entitled. The objection is on the same ground as the previous testimony attempted to be introduced in this record by Mr. Ziffrin.

[fol. 411] Exam. Lawton: I take it you will make the evidence a little more direct and specific, will you, Mr. Ellis?

Mr. Ellis: I am attempting at this time to pass the general question which I think informs the protestant of exactly was we claim we were doing, and this traffic manager who directed the flow of these shipments who is willing and ready to testify under oath what was done. That is what we are trying to show.

Exam. Lawton: Overruled. He may answer.

The Witness: We did until such time as our contract expires. I don't know whether you said continuously or not.

By Mr. Ellis:

Q. Were those shipments from your distilleries and warehouses and points of origin, wholesale house dealers to points of destination through this territory you have described?

A. Yes.

Mr. LaTourette: We object to that question on the same ground as heretofore stated. This is certainly not adequate and competent proof of physical operation by this applicant.

Mr. Ellis: That is for the Commission.

Exam. Lawton: It is very general in its nature. It will be permitted.

The Witness: The answer was yes.

By Mr. Ellis:

Q. Where is your distillery, Mr. Chandler?

A. In Louisville, in Baltimore. The distillery is in Louisville and distilleries in Baltimore.

[fol. 412] Q. When you have reference to distribution of your product in this territory, is it from the Louisville, or from the Baltimore distillery by Ziffrin, Incorporated?

A. From Louisville.

Q. From the Louisville distillery?

A. Yes.

Q. Did you on July 1, 1935, or do you now have any particular destinations that you ship liquor to throughout the territory that you describe?

A. Throughout the entire territory described.

Q. Directing your attention to the distilleries which are members of the association which you represent in this proceeding, do you know of your own knowledge whether or not those distilleries use the services of Ziffrin, Incorporated, for the transportation of alcoholic beverages in interstate commerce on and around July 1, and since in the territory which you have described?

Mr. LaTourette: Now, we object to the question on the ground it is certain this witness is not qualified to testify what was done by these twenty-eight distilleries. He is not any more qualified to answer that question than he was to testify with reference with respect to those contracts.

By Exam. Lawton:

Q. Do you represent all of them?

A. I do.

Q. As traffic manager?

A. No, as vice-president of our association. We hold our [fol. 413] meetings once a month and confer with each other, and know exactly what is going on in our industry.

Exam. Lawton: Objection sustained.

Mr. Ellis: We offer to prove by this witness, who is vice-president and official representative at this hearing, by intervention, an appearance of the Kentucky Liquor Producers Traffic Association——

Exam. Lawton: Just a minute, Mr. Ellis. You won't need to read all of those. I am going to ask this witness to identify that part of his petition that contains the list and put it in as an exhibit.

The Witness: We do identify that.

Mr. Ellis: Then, we offer to prove by this witness that the Kentucky Producers Traffic Association, and that the members thereof are listed as an appendix attached to the petition of intervention that was filed in this proceeding, use the services of the applicant, Ziffrin, Incorporated, under contract for the transportation of alcoholic liquors and distillery supplies in the territory which has been described on or about, before and since July 1, 1925, in interstate commerce under contract.

[fol. 414] Mr. LaTourette: To which I will object.

Exam. Lawton: Proceed.

By Mr. Ellis:

Q. Mr. Chandler, I believe you stated you resided in the State of Kentucky?

A. I do.

Q. And are you both by reason of your residence there and by reason of your association with the Kentucky Liquor Producers Traffic Association familiar with the location of the distilleries of the members of said association?

A. Yes.

Q. I will ask you whether or not the territory in the State of Kentucky within a radius of 150 miles of the city of Louisville would include the location of all said distilleries?

A. Yes.

Q. Mr. Chandler, referring specifically to Frankfort Distilleries, have you compiled a list of some of the principal points in the states involved in this territory to which you had shipments using the service of Ziffrin, Incorporated, on or about, since June 1, 1935?

A. No. I have not compiled it but I could call them off.

Q. I wish you would state those for the record.

Mr. LaTourette: We make the same objection to that question.

Exam. Lawton: Read the question.

(Question read.)

[fol. 415] By Exam. Lawton:

Q. What would your knowledge be based on, Mr. Chandler?

A. On my shipments to those states.

Q. On your records that you keep of the shipments?

A. I wouldn't say records I keep. I know we shipped by them, by Ziffrin, Incorporated, because I routed the shipments.

Q. Have you recently consulted those shipments to refresh your memory of what happened back in 1935?

A. I can remember pretty nearly what happened four years ago.

Exam. Lawton: Let him be subject to cross examination. I will permit the answer.

By Mr. Ellis:

Q. You understand what you have been asked?

A. Yes.

Q. I want to know whether you want the question read to you.

A. If we want to take time to call for various points, I can say I would rather say to various points in the State of Wisconsin, in Indiana, in Illinois, and Ohio. Various points I think that would be.

Q. In the State of Wisconsin, for example, can you give us a few of the principal points?

A. Yes, Milwaukee.

Q. Illinois?

A. Chicago, Rockford, many points in Illinois.

Q. Can you name some more in the State of Illinois?

A. Yes. Springfield, Pontiac, Metropolis down on the [fol. 416] border, Decatur.

Q. How about Indiana?

A. Oh yes, into Indianapolis, Fort Wayne, Indiana Harbor, a lot of points.

Q. What about the State of Ohio?

A. Into Cincinnati.

Mr. Ellis: You may cross-examine.

Cross-examination.

By Mr. LaTourette:

Q. Mr. Chandler, you mentioned Milwaukee as one of the points to which you ship. Can you give me the reference and the specific date, the consignee, the consists of the shipment and the weight of the shipment to Milwaukee that you mentioned in your testimony about Milwaukee?

A. Specific date?

Q. Yes.

A. On or about July 1st, now the specific date.

Q. Yes. How much of a shipment? How much did the shipment weigh?

A. In 30,000 pounds, a carload.

Q. Carload?

A. Yes.

Q. Was it shipped by rail?

A. No, sir.

Q. Ship 30,000 pounds in one truck?

A. No, sir. That would be unlawful in the state.

[fol. 417] Q. Of how many packages did that consist?

A. 600, between 600 and 625. It depends entirely upon the weight of the case, some quarts, pints or half pints, and miniatures weigh differently.

Q. What is the freight charge of that shipment?

A. What is the freight charge?

Q. Yes.

A. That I would have to refresh my memory on.

Q. To whom was it consigned?

A. To Frankfort Distilleries, Incorporated.

Q. In Milwaukee?

A. Yes, sir. Care of Frankfort Distilleries, Incorporated, Milwaukee.

Q. You do not know the date?

A. Not exactly, on or about that time.

Q. Could you tell us when it was that the shipment moved?

A. On or about that time.

Q. I mean, could you tell us any more specifically than that?

A. On or about that time.

Q. That is as far as you can go to describing the date?

A. That is right.

By Exam. Lawton:

Q. Might it have been after July 1st?
A. That I doubt.

By Mr. LaTourette:

Q. How sure are you about that?
A. Because I remember the enactment of the Motor Car-
[fol. 418] rier Act and I know it was before that time.
Q. Before that time?
A. Yes.
Q. What date did the Motor Carrier Act become effective?
A. 1935, July 1st.
Q. What date in 1935?
A. July 1st.
Q. It became effective July 1st?
A. It was passed then, then approved, I think it is August, 1935, I think was the final period.
Q. Do you think the Motor Carrier Act became effective then in August, 1935?
A. I think it was, yes.
Q. This shipment moved prior to the effective date of the Motor Carrier Act?
A. Moved prior to July 1st.
Q. Didn't you say it moved prior to the effective date of the Motor Carrier Act?
A. I said that it moved.

Mr. Ellis: Wait a minute, Mr. Witness. He has answered it.
Mr. LaTourette: I am just trying to get straight what he said. That is all.
Exam. Lawton: All right, simply testing the witness' knowledge.

[fol. 419] By Mr. LaTourette:

Q. You testified as to a shipment from Frankfort to Metropolis, Illinois.
A. I did not mention Frankfort.
Q. Louisville, then, is that right?
A. Which would you like me to answer?

Q. I am asking you did you testify as to movement from Frankfort to Louisville?

A. Transfer from Louisville.

Q. Transferred from Louisville, pardon me. Now, this shipment that you mentioned to Metropolis, Illinois, what date did that move?

A. That particular shipment moved after the enactment of the Motor Carrier Act.

Q. How about the shipment to Pontiac, Illinois?

A. Prior to it.

Q. Prior to what?

A. Prior to July 1st, 1935.

Q. What was the weight of that shipment?

A. Approximately 18,000 pounds, 18,000 pounds approximately.

Q. 18,000 pounds approximately?

A. Yes.

Q. What were the freight charges of that shipment?

A. That I don't remember.

Mr. Ellis: We object to what the charges are.

The Witness: I have the freight charges.

[fol. 420] Mr. LaTourette: Mr. Examiner, these questions certainly go to the credibility of this witness, the weight of the testimony as to these operations.

Exam. Lawton: I think so. This going back and setting the amount of the charges would not be prejudicial in any way. He may answer if he knows.

The Witness: That I couldn't without referring to past records.

By Mr. LaTourette:

Q. Were these shipments delivered on trucks of the Ziffrin, Incorporated, or Ziffrin Truck Lines Inc.?

Mr. Ellis: We are going to object to the introduction of Ziffrin Truck Lines into this.

Exam. Lawton: Reframe that question, Mr. LaTourette.

Mr. LaTourette: Strike that.

By Mr. LaTourette:

Q. State the heading of the document on which the shipment to Metropolis was delivered.

A. Ziffrin, Incorporated.

Q. What was the pro number of Ziffrin, Incorporated, on that shipment?

A. That I don't remember.

Q. Now, as to the shipment to Milwaukee, state the heading of the document that that shipment was delivered.

A. Ziffrin, Incorporated.

Q. What was the number of that?

[fol. 421] A. That I don't remember.

Q. As a matter of fact, you don't remember or do not have any specific knowledge as to any of these shipments. You are simply testifying from your best recollection, aren't you, Mr. Chandler?

A. Positively.

Q. You did not examine this morning or last night your records to determine where shipments might have moved from Louisville, did you?

A. No, I didn't.

Q. Even if I took each one of these points individually and examined you as to each one, you could not tell me any more than you have told me with respect to these particular shipments, could you?

A. No, I could not.

Mr. LaTourette: That is all I have.

By Mr. Goodman:

Q. Mr. Chandler, when did the contract you had with Ziffrin, Incorporated, expire?

A. That I think is a matter between Ziffrin, Incorporated, and Frankfort Distilleries.

Q. I would like to have it be a matter between you and me.

A. I don't have the right to disclose what my contract is to you or anyone else.

Q. I did not mean what the contents of the contract were.

A. I said to you it is on file with the Interstate Commerce [fol. 422] Commission in Washington, D. C.

Q. I do not want to know the contents of the contract, Mr. Chandler, just the date it expires.

A. I told you for correct information to look at the contract which is on file with the Interstate Commerce Commission.

By Exam. Lawton:

Q. Mr. Chandler, you stated on direct examination that the contract had expired.

A. Yes.

Q. You are attempting to put in testimony here, I take it, which will support the grandfather claim of this applicant. Suppose the contract expired in April, 1935. Your testimony would not be of very much help to us. Certainly they have a right to ask you on cross-examination about when that contract expired, if you know. You have testified that the contract expired. Of course, if you refuse to answer we cannot compel you. I think you should answer it.

A. I will be governed by your advice in the matter. I think our contract expired in 1937, October.

By Mr. Goodman:

Q. How many contracts have you entered into with Ziffrin, Incorprated?

Mr. Ellis: We think that is objectionable.

By Mr. Goodman:

Q. How many contracts have you ever entered into with Ziffrin, Incorporated, Mr. Chandler?

Exam. Lawton: He may answer.

The Witness: What?

[fol. 423] Exam. Lawton: You may answer.

The Witness: One contract.

By Mr. Goodman:

Q. That is the only contract you ever had with Ziffrin? That is the one that you speak of that had expired, is that correct?

A. Yes. That is correct.

Q. That was a contract for one year, was it not, Mr. Chandler?

A. That is right. But I would like to qualify that statement just on this basis: that was only to a certain date that the Commission wanted those contracts on file, and we had to get written contracts with Ziffrin Truck Lines, Incorporated, and we had a verbal contract with Ziffrin, Incorporated.

By Exam. Lawton:

Q. Prior to this contract?

A. Absolutely. It is for the date the Commission asked that the contracts be placed on file.

Q. Prior to that you had simply a verbal agreement?

A. Yes.

Q. With Ziffrin, Incorporated?

A. Yes.

By Mr. Goodman:

Q. Mr. Chandler, did you know that there was also Ziffrin Truck Lines——

Mr. Ellis: I am going to object to that.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record.

[fol. 424] Mr. Goodman: Read it.

(Last question read by the reporter.)

The Witness: I think it is my duty as Traffic Manager to know all truck lines that operate.

Q. Did you know that there was a Ziffrin Truck Lines?

A. I know there was a Ziffrin and all other lines.

Q. I beg your pardon?

A. Yes, I did.

Q. You did?

A. Yes.

Q. Did you know that prior to the entry of a written contract in October, 1936, whether or not the movement of whiskey moved on the trucks of Ziffrin, Incorporated, and Ziffrin Truck Lines?

A. You will have to go and ask Mr. Ziffrin how he handled that material. I do not have any supervision over that.

Q. Do you know when he made the oral agreement that prior to this contract he had been making movements on both Ziffrin, Incorporated, and Ziffrin Truck Lines?

Mr. Ellis: I am going to object to this.

The Witness: I have already submitted testimony on Ziffrin, Incorporated.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

[fol. 425] By Mr. Goodman:

Q. Mr. Chandler, do you know of your own knowledge whether you ever moved a shipment of whiskey from Louisville, Kentucky, to Decatur, Illinois, prior to July 1, 1935?

A. Yes.

Q. Can you tell me to whom that moved?

A. Frankfort Distilleries.

Q. You have an agent at Decatur?

A. We consign all shipments to ourselves.

Q. You consign it to yourselves?

A. Yes.

Q. Do you remember the weight of that shipment?

A. To Decatur?

Q. Yes.

A. I think that was approximately 18,000 pounds.

Q. That moved about July, 1935?

A. On or before.

Q. On or before?

A. Prior to that, prior, I would say prior.

Q. You would say prior?

A. Yes.

Q. How would you know?

A. How would I know?

Q. Yes.

A. Because by the Motor Carrier Act taking effect on [fol. 426] that date, the Motor Carrier Act.

Q. In other words, when the Motor Carrier Act went into effect you made it your practice to memorize all shipments that moved to that point in the State of Illinois from Louisville?

A. No, I did not do that.

Q. Do you know whether or — it moved on a Ziffrin, Incorporated bill or on a Ziffrin Truck Line?

Mr. Ellis: There you are again.

Exam. Lawton: Let me ask you this:

By Exam. Lawton:

Q. All of these shipments moved on some sort of a bill of lading, did they not?

A. Yes, sir, which we make up.
Q. Which carried the name of the trucker?
A. That is right.
Q. All right, you may answer the question.
A. On Frankfort's ink? The question was, as I understand it that you asked me whether it moved on Frankfort's ink or Ziffrin, Incorporated, ink or if you mean by ribbon or ink.

Exam. Lawton: Inc. is the abbreviation for incorporated. All right.

Mr. Goodman: That is all.

Exam. Lawton: Any further cross-examination?

(No response.)

Exam. Lawton: If there is none I have some questions to ask.

[fol. 427] By Exam. Lawton:

Q. How many carriers do you use or did you use during the period covered by your testimony?

A. That is very fine, Mr. Examiner. I appreciate your asking me that question. There was very few that were qualified to haul alcoholic liquors in those days. In fact today, under the Commission's orders where a truck line, common carrier truck lines, today operating out of Louisville, there is not one of them who has complied with the Commission's ruling. They have furnished me insurance policies but they have not incorporated that in their tariffs. Ziffrin, Incorporated, is the only trucking line today operating, or a common carrier today, that has provided and complied with the Commission's order and put it in their tariff holding themselves open to extend to all shippers that which they have given to me.

Exam. Lawton: Just a minute, Mr. Chandler.

Mr. LaTourette: We move that entire statement be stricken.

Exam. Lawton: The last part will be disregarded.

By Exam. Lawton:

Q. I want to know if you recall on or about July 1, 1935, how many carriers your company used?

A. There wasn't very many that I would use in shipping alcoholic liquors.

Q. Do you recall any definite number?

A. I would say I could count them on one hand, yes, sir.

Q. You would say there were about five?

[fol. 428] A. Not over that.

Q. Of whom Ziffrin, Incorporated, is one?

A. Ziffrin, Incorporated, yes, sir.

Q. About that time I believe you stated you were operating under a verbal agreement with the applicant here?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Do those agreements stand for any definite period?

A. Those rates could be in one day and the next time where another fellow would come around and put in another rate and we could change it, subject to change.

Q. In other words, wouldn't it be something like this, that Mr. Ziffrin would come in and ask if you had any traffic for him and then you and he would agree?

A. Yes, sir.

Q. On the rate?

A. That is correct, yes, sir.

Q. I would come in one week you would have an agreement as to a particular load then the next week you would agree on something different?

A. Absolutely correct.

Q. It was just an agreement that you would enter into on any particular occasion?

A. With Ziffrin, yes, sir.

[fol. 429] Q. Of course, I presume you operated under the same conditions with the other carriers whose services you used?

A. Yes, but some of them did not operate as making contracts with me. They came in and gave me a list of rates and said "Here is our rate".

Q. The applicant did not do that?

A. No, sir.

Q. Did you make a different rate, different agreement for each load?

A. For different territories he told me what his rates were to those various points.

Exam. Lawton: I have no more questions.

By Mr. Ellis:

Q. Mr. Chandler, just one question. When you referred to the paper you have before you calling it the tariff of Ziffrin, Incorporated, I will ask you whether or not that was inaccurate? It is in fact a schedule of minimum rates of Ziffrin, Incorporated, filed with the Interstate Commerce Commission?

A. That is correct.

Exam. Lawton: May I see it?

The Witness: Yes.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record. That list of the members of your association, Mr. Chandler, would be [fol. 430] identified as exhibit 2 and received in the record.

(Applicant's exhibit 2, witness Chandler, received in evidence.)

Mr. Ellis: I take it, Mr. Examiner, however, that the petition of intervention filed necessarily will be accepted, am I correct in that?

Exam. Lawton: Yes. The Kentucky Liquor Producers Traffic Association will be treated as an intervener in the case.

Mr. Ellis: Are you through, Mr. Examiner?

Exam. Lawton: Yes.

Mr. Ellis: One other question or two.

Redirect examination.

By Mr. Ellis:

Q. You were advised some little time ago you would be asked to testify in this proceeding, were you not?

A. Yes, I was.

Q. Have you since that time, taken occasion in a general way, without memorizing the pro numbers and the rates, and the various statistical details, have you without doing that taken occasion to confirm your recollection and verify it as to your testimony relative to the use of the services

of Ziffrin, Incorporated on about, before and since June 1, 1935?

A. The reason I did that was because many——

Mr. LaTourette: We move to object to that. It is not responsive.

[fol. 431] Exam. Lawton: No. Please answer the question.

By Mr. Ellis:

Q. Answer yes or no to the first part. You can answer you did or you didn't?

A. Yes, I did.

Q. Now, will you state to the Commission why you did that?

A. The reason I did that was that many of the common carrier truck lines at Louisville called me up and told me that they were going to crucify Ziffrin. We could have the use of the common carrier——

Mr. LaTourette: I move that be stricken.

By Mr. Ellis:

Q. You mean contract carrier?

Mr. LaTourette: I move that be stricken, Mr. Examiner.

Exam. Lawton: That will be disregarded.

Mr. LaTourette: I should be physically stricken from the record.

The Witness: However, I could further support that, Mr. Examiner——

Exam. Lawton: No, just a minute.

Mr. Ellis: That is all, Mr. Chandler unless there is some further question.

Exam. Lawton: Any recross?

Recross-examination.

By Mr. LaTourette:

Q. When you made this examination that your counsel told you of, it was for the purpose of advising the Commis-[fol. 432] sion as to what you had been doing specifically in the matter of transporting freight by Ziffrin, Incorporated?

A. I don't think that I mentioned that myself who entered into the case at all.

Q. Whoever requested that you appear here, did they tell you that your appearance was for the purpose of advising the Commission and the parties as to what shipments you actually transported over Ziffrin?

A. Nobody told me that at all. I saw that in the Traffic Bulletin. That is where I first received knowledge of it.

Q. Did he tell you to bring any records?

A. Nobody told me to do anything. I did exactly as I wanted to do.

Q. Did he request then, that you do anything?

A. Who?

Q. Whoever asked you?

A. You are referring to my counsel? Do you mean my counsel?

Q. No, Mr. Chandler. Let's get each other straight. I am simply trying to develop this for the record. Some one requested that you appear here in behalf of this applicant.

A. Are you asking me why they did that?

Q. Didn't somebody request that you appear here in behalf of this applicant?

A. No.

[fol. 433] Q. Did you come here voluntarily?

A. Absolutely, paying my own way.

Q. I am not inquiring into that. That is your own business, but you came here voluntarily, is that it?

A. Absolutely.

Q. Not at the request of the applicant?

A. No, sir.

Q. Now, when you made up your mind to come here, did you understand that if you were going to put in testimony to inform the Commission and the parties as to what transportation service Ziffrin had performed for you, it should be in some specific nature so that the parties might know what your testimony relates to?

A. Will you ask me that question again, please.

(Question read.)

Exam. Lawton: Strike it.

By Exam. Lawton:

Q. Now, you said you came here voluntarily. That is correct, is it?

A. Yes.

Q. Did you understand that if your testimony was in support of claims of Ziffrin, Incorporated as to transportation service performed by it, you should inform the Commission and the parties specifically as to what service they have performed for you?

A. Yes, I understood that.

[fol. 434] Q. Yes.

A. And you see I have very many duties.

Q. Yes, I understand.

A. Of course, I didn't have the opportunity of devoting the time that I would like to it.

Q. I see. And that is the reason that you are not in a position to give us specific information?

A. That is correct.

Q. Now, you say you came here voluntarily. Were you sent here by the Kentucky Distilleries Association?

A. Yes, sir. I was not sent here. We had a meeting and said we would. The Association did not pay anything to me to come here. I foot my own expenses of whatever it is.

Q. Have you been authorized by the Kentucky Liquor Producers Association to appear here in support of this application?

A. Absolutely.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

The Witness: Yes, I have. And the verification is attached to it.

By Exam. Lawton:

Q. Well, the verification you have referred to is simply the president of the association has stated that the matters in the petition are stated on information and belief, is that not true?

[fol. 435] A. Yes, sir.

Q. That verification does not say anything in respect to authorization to you to appear here in behalf of the Kentucky Distilleries Association, does it?

A. No, sir.

Exam. Lawton: In view of the question that has been raised in reference to the verification which is attached to

the petition of intervention, I take it we will have to proceed receiving that petition.

The Witness: That is fine.

Exam. Lawton: We are receiving the list as an exhibit. We will receive the petition.

Mr. LaTourette: I have not had an opportunity, Mr. Examiner, to read the exhibit completely. If it contains therein any reference or allegation as to transportation services performed by this applicant in behalf of the interveners I am going to move that that part be stricken and not considered by the Commission.

Exam. Lawton: I was happy to keep it out on that basis, Mr. LaTourette, but the questions on cross-examination made so many references to it, we have got to have it put in there.

Mr. LaTourette: My motion is, any part which may relate to transportation services be stricken, since that has no place in the petition for intervention, and is not competent proof.

[fol. 436] Exam. Lawton: It will be received only as a petition of intervention setting forth simply the interest of the parties.

Mr. LaTourette: That is all I have.

By Mr. Goodman:

Q. Mr. Chandler, when did you refresh your memory for the purpose of this hearing as to the books and records of your company or of your association?

A. Oh, within the last month.

Q. You were pretty busy when you were doing it?

A. Sir?

Q. You say you did not spend as much time on that as you would like to spend?

A. That is right.

Q. How much time did you spend?

A. Not very much.

Q. Approximately, did you spend a day?

A. At different intervals, maybe a couple of hours.

Q. A couple of hours altogether?

A. Yes.

Q. What did you look through during that couple of hours? What type of an examination did you make?

A. Oh, the order books that we had coming into our distillery, and the like.

Q. You looked back for orders?

A. Some orders that we had, yes.

[fol. 437] Q. What else?

A. And some freight bills.

Q. In other words, you took these orders and just thumbed through them?

A. I looked through them.

Q. You looked through them?

A. Yes, trying to see as to what extent we had used Ziffrin, Incorporated.

Q. I see. There is nothing on the orders that you looked through that would indicate what movement was handled by Ziffrin, was there?

A. I think I testified to that before that the bills of lading and the like were made up to Ziffrin, Incorporated.

Q. And from the examination of those orders and freight bills, a couple of months ago, you are able to tell us to a certainty that an 18,000 pound movement of whiskey moved from Kentucky to Decatur, Illinois?

A. These are all approximate figures.

Q. Yes.

A. It may be a few pounds one way or the other.

Q. You can remember from thumbing through those a few months ago that a shipment of 20,000 pounds moved to a destination as you testified?

A. Yes, sir.

By Exam. Lawton:

Q. Mr. Chandler, prior to the time that you entered into [fol. 438] the written contract with the applicant, to which you have made reference, all of your dealings with the applicant were based on these verbal agreements that were made from time to time. Is that right?

A. Well, I would not like to say all; some cases there was correspondence in between them on rates to certain points.

Q. Well——

A. Either verbal or written.

Q. Correspondence?

A. Correspondence.

Q. Or other conversations?

A. Yes.

Q. Those conversations were had with Mr. Sam Ziffrin?
A. And his various representatives.

Exam. Lawton: I have no further questions.
Mr. Ellis: Step down, Mr. Chandler.
Mr. Goodman: I would like to have permission to ask just one more question.
Exam. Lawton: I have just one more question.

By Exam. Lawton:

Q. That first written contract was about April 1, 1936, or October 1?
A. October.
Q. October 1?
A. It was written in October. It expired in October, to the best of my knowledge.

[fol. 439] Exam. Lawton: Did I hear some one express a desire to ask another question? Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record.
Mr. Goodman: I have no more.
Mr. Ellis: Step down.
Exam. Lawton: You are excused.

(Witness excused.)

Exam. Lawton: Proceed.

Frank H. Luther, was sworn and testified as follows:

Direct examination.

By Mr. Ellis:

Q. Will you state your name for the Commission, please.
A. Frank H. Luther.
Q. Your address?
A. 252 Eastern Parkway, Louisville, Kentucky. I am general traffic manager of Jos. Seagram & Sons, Incorporated, Calvert Distilling Company, and Carstairs Bros. Distilling Company, Incorporated, Reliance Distilling Com-

pany, and other subsidiary companies, Distillers Corporation, Seagram, Limited, of Montreal Canada. That is the American plant.

A. Are the various companies and subsidiary companies to which you have made reference as their names would indicate, engaged in the business of manufacture and sale [fol. 440] of alcoholic liquors?

A. They are. They have distilleries at St. Denis, Maryland; Lawrenceburg, Indiana; Louisville, Kentucky; bottling and rectifying plants at Philadelphia, Pennsylvania; St. Denis, Maryland; Lawrenceburg, Indiana; and Louisville, Kentucky, as well as warehousing in the cities of New York, Chicago, Denver, San Francisco, and Los Angeles, California.

Q. Directing your particular attention, Mr. Luther, to that part of the United States, included in the territory in the state of Kentucky, within a radius of 150 miles of Louisville, all of the state of Indiana, all of the state of Illinois, all of the state of Ohio, that part of the state of Pennsylvania in and around Pittsburgh and Schenley, Pennsylvania, St. Louis, Missouri and Milwaukee, Wisconsin, do you have that territory I have described in mind?

A. Yes.

Q. I will ask you whether or not your companies distribute and sell your products in that territory?

A. They do.

Q. How many of your rectifying and manufacturing plants are in that territory?

A. There are two at Lawrenceburg, Indiana; and Louisville, Kentucky.

Q. Is the distribution and sale of your product, alcoholic liquors in the territory which has been described generally, [fol. 441] or is it confined to specific cities and towns?

A. Well, in the monopoly states, of course, it is confined to a few cities and towns. In the open states, it is general. In Pennsylvania, in the territory here involved, it is Pittsburgh, Pennsylvania, and Newcastle, Pennsylvania. In Ohio we have five towns, Canton, Cleveland, Columbus, Cincinnati and Toledo. In the states of Indiana, Illinois, Wisconsin and Kentucky, which are known as open states, why it is a general distribution to distributors and wholesalers in those territories.

By Exam. Lawton:

Q. I have an interruption there. I was interested in your expression, "monopoly states."

A. Yes.

Q. Is that where they generally sort of divide the territory up among themselves.

A. No, sir. Those states that are controlled by a Board. For instance, in Pennsylvania, the whiskey is bought outright by the state, and then distributed to their stores. In Ohio we ship into the warehouses in bailment. As it is taken out by the states and distributed, of course, we bill the state, who has to pay it.

Q. The monopoly state is a state in which it, itself engages in the sale?

A. That is right.

By Mr. Ellis:

Q. Directing your particular attention to the applicant in [fol. 442] this case, Ziffrin, Incorporated, are you familiar with that company?

A. Yes, sir. Very much so.

Q. I will ask you whether or not, on or about, before and since July 1, 1935, your company has used the service of the applicant, Ziffrin, Incorporated, under contract for the transportation of alcoholic liquors and distillers supplies in interstate commerce in the territory which has been described heretofore?

Mr. LaTourette: We object to that question on the same ground as previously, as such testimony is not competent to prove of any physical operation by this applicant.

Exam. Lawton: He may answer.

The Witness: Yes, we used them prior to July 1st, 1935, and since then and are today.

By Mr. Ellis:

Q. Are the movements which Ziffrin, Incorporated on or about July 1, 1935, before and since confined to movement from points of origin such as Lawrenceville?

A. Lawrenceburg.

Q. Lawrenceburg and Louisville, out into the territory and are there also reverse or return movements?

Mr. LaTourette: May I object to this testimony.

The Witness: We also have reverse movements. We have also had movements to our agents at Lawrenceburg, and Louisville, Kentucky.

[fol. 443] By Mr. Ellis:

Q. Do I understand there has been transported in interstate commerce by the applicant, Ziffrin, Incorporated, on or about, before and since, shipments of alcoholic liquor, by your company under contract both ways, between Lawrenceburg, Indiana, and Louisville, Kentucky?

A. Yes.

Q. Has Ziffrin, Incorporated, handled any distillers' supplies for you?

A. They have in the past, yes, sir.

Q. On or about July 1, 1935?

A. Before that, and since that.

Q. Is that a movement from various points of origin in this territory into your distilleries and rectifying plants?

A. That is correct.

Mr. Ellis: Take the witness.

Exam. Lawton: You may cross-examine.

Mr. Thomas: I have one question, Mr. Examiner.

By Mr. Thomas:

Q. Will you please tell me, if you will, just when your plant in Louisville, started operation?

A. You mean the distillery or bottling plant?

Q. The distillery?

Exam. Lawton: Just a minute, off the record.

(Discussion had off the record.)

Exam. Lawton: Are you a member of the Commission's bar, Mr. Thomas?

[fol. 444] Mr. Thomas: No, sir.

Exam. Lawton: What is your connection with the Reliance Trucking Company?

Mr. Thomas: General manager.

Exam. Lawton: Let the record show that Mr. Thomas is here representing the Reliance Trucking Company as general manager. All right.

Mr. Thomas: Thank you.
Exam. Lawton: What was your question?

By Mr. Thomas:

Q. My question was: what date did the Louisville Distillery start operation?

A. The Louisville Distillery has been in operation, I would say, offhand, about a year and a half. The bottling plant.

Q. I did not ask you about the bottling plant, thank you.

A. But I might add to that the Jos. Seagram & Sons had their distilleries manufacturing for them prior to that time, and possibly somewhere around 150,000 barrels or so, of whiskey have been moved from those other distilleries into our plant now at Louisville.

Mr. Thomas: That is all.
Exam. Lawton: You may continue the cross-examination.

Cross-examination.

By Mr. Goodman:

Q. Mr. Luther, as general traffic manager of Jos. E. Seagram & Sons, and subsidiaries, are you familiar with the operations, out of Lawrenceburg, Indiana?

[fol. 445] A. Fairly familiar, yes, sir.

Q. I mean, you would have direct knowledge of what goes on at the plant at Lawrenceburg, Indiana, as far as movements of freight are concerned over Ziffrin, Incorporated?

A. So far as the traffic department is concerned, yes, sir. We have charge of all shipments out of and into the plant at Lawrenceburg, Indiana. The traffic manager at that plant is under my supervision, and all outbound shipments and copies of the bills of lading come across my desk. I might state those bills of lading by the Ziffrin, Incorporated, their bills of lading are typed.

Exam. Lawton: Hereafter, please confine your answer to the question.

By Mr. Goodman:

Q. Do any appear on the Ziffrin Truck Lines at any time?

A. My testimony was with reference to Ziffrin, Incorporated.

Q. Yes, I know.

A. That is right.

Q. Did you ever have any documents appear at your desk which showed the bill "Ziffrin Truck Lines"?

A. Do you want me to answer that?

Q. Yes.

A. Yes.

Q. That was a movement of whiskey, was it not?

A. Yes, sir.

[fol. 446] Q. Where does that whiskey move to?

Mr. Ellis: We are going to object to that. It does not tend to prove or disprove anything here. Ziffrin truck lines operate on the authority of the Interstate Commerce Commission, and has the right to transport commodities, *and has the right to transport commodities.*

Exam. Lawton: Overruled. He may answer.

By Mr. Goodman:

A. Where did that movement of freight move to?

A. If it is small shipments, possibly 10 to 25 cases, l.c.l. it may be into the territory here in question.

Q. Isn't it a fact, Mr. Luther, that you had a great quantity of movements between Harrisburg, Indiana, and Chicago, Illinois, that moved via the Ziffrin Truck Lines?

A. Not that I know of.

Q. Would you say that there was not?

A. Not to my knowledge, not as I know of myself.

Q. Isn't it a fact, Mr. Luther, that at Lawrenceburg, Indiana, that a movement of whiskey moved through into Chicago on Ziffrin Truck Lines, and then it was switched over to Ziffrin, Incorporated?

A. Not that I know of. I have no knowledge of what Mr. Ziffrin does, whether he moved it on Ziffrin Truck Lines.

Q. It actually moved on Ziffrin Truck Lines billing?

A. Not as I know of, no, sir.

[fol. 446½] Q. You wouldn't say that it did not, would you?

A. To my knowledge, I couldn't say. As far as I know, what information I have by looking over the billings and stuff, I haven't any knowledge.

Q. Isn't it a fact that at one time the rate on movements of whiskey from Lawrenceburg, Indiana, to Chicago, Illi-

nois, that on the movement of freight that moved on the Ziffrin Truck Lines——

Exam. Lawton: Let us try it over again.

By Mr. Goodman:

Q. Isn't it a fact, Mr. Luther, that when you moved your shipments of whiskey from Lawrenceburg, Indiana, to Chicago, Illinois, via Ziffrin Truck Lines, Incorporated, you had to pay a higher rate than you did when you moved over Ziffrin, Incorporated?

Mr. Ellis: To which we object. It does not tend to prove or disprove any issue. It is not a relevant question.

By Exam. Lawton:

Q. It looks like a very relevant question.
The Witness: Not as I know of.

By Mr. Goodman:

Q. Do you mean to tell me you do not know what the rates were on whiskey that moved from Lawrenceburg, Indiana, to Chicago?
A. When?
Q. In 1935, any part of the year?

Exam. Lawton: In other words, he wants to know whether [fol. 447] you had to pay a higher rate when Ziffrin Truck Lines moved it than you did when Ziffrin, Incorporated, moved it?

A. I do not know of Ziffrin Truck Lines moving any of our stuff to Chicago.

By Mr. Goodman:

Q. Did you ever have any conversations with Mr. Ziffrin?
A. When?
Q. With regard to the movement of freight from Lawrenceburg, Indiana, to Chicago, Illinois?
A. Many conferences, yes, sir.
Q. Did you know at the time you were talking to him whether or not he was representing Ziffrin, Incorporated, or Ziffrin Truck Lines?

Mr. Ellis: Wait a minute. That is just getting into exactly the thing we are objecting to.

Mr. Goodman: I will tell you what we will do. We will take him off the stand and put him back, and I will do the same thing over again.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

By Mr. Goodman:

Q. Mr. Luther, when did your present contract with Ziffrin, Incorporated, expire?

A. It has no expiration date.

Q. It has no expiration date?

[fol. 448] A. No, except upon agreement between the parties.

Q. When was that contract entered into?

A. The written contract was entered into, I think, in November, 1936. Prior to that time it was verbal between the company.

Q. The contract was verbal?

A. Yes. And when the Commission required that all contracts be filed, of course, it was put into writing.

Q. Did you hear the questions that were asked Mr. Chandler with regard to the type of a contract that existed, that is, oral contract that existed?

A. I heard you ask him questions with respect to it.

Q. Did you hear the answers of Mr. Chandler?

A. Yes, sir, I did.

Q. Would you say that your contract, your oral contract, was similar to that of Mr. Chandler?

Mr. Ellis: I am going to object to that. If he wants to ask this witness a question, he cannot do it in that manner.

Exam. Lawton: He can state it was the same as he heard you say.

By Mr. Goodman:

Q. In other words, Mr. Luther, would you say you had an agreement on each load of merchandise that moved?

A. No, sir. Our contract was that Mr. Ziffrin moved it to [fol. 449] certain points at certain rates.

Q. Your contract was with Mr. Ziffrin, was it not?

A. Yes.

Q. You were not concerned whether he represented Ziffrin, Incorporated, or whether he represented Ziffrin Truck Lines?

A. When I am speaking, I am speaking of Ziffrin, Incorporated.

Q. When you talked to him, you talked to him as Ziffrin, Incorporated?

A. That is right.

Q. How did it happen there are bills appearing on your desk at Louisville from the Ziffrin Truck Lines?

A. On whose desk?

Q. On your desk at Louisville. Didn't you say there were, at one time there were bills appearing on your desk with the Ziffrin's Truck Lines name on them?

A. There are other common carriers that I would have there, other truck lines.

Q. How do you know you were not dealing with him on the basis of Ziffrin Truck Lines?

Mr. Ellis: That is what I say they are trying to get into it. I am going to object to it.

Exam. Lawton: We will permit this one answer. Then, I think you had better proceed.

The Witness: I thought we both knew the English language. When we talk about Ziffrin, Incorporated, we are [fol. 450] talking about Ziffrin, Incorporated. When we talk about Ziffrin Truck Lines, I knew he was talking about the common carrier. If I would go into the contract that is between Mr. Ziffrin and ourselves, I would have to divulge information which I do not think I would care to give out, and I am protected by ICC Act under Section 222-F, that I do not have to divulge it. I did state for the Commission's record here that we do ship over Ziffrin Trucking Company all shipments of 20 to 25 cases.

By Mr. Goodman:

Q. Mr. Luther, with regard to this question of rates, isn't it a fact that you had a reduction of rates in November, 1936, or thereabouts?

Mr. Ellis: Wait a minute.

By Mr. Goodman:

Q. On the basis of your contract?

Mr. Ellis: Are you inquiring into the provisions of the contract between Ziffrin's and Mr. Luther's company?

Mr. Goodman: No, I am merely inquiring as to whether or not he got a break or got a reduction in rates as of November, 1936.

Mr. Ellis: I am going to object to the question.

Exam. Lawton: I do not see the relevancy of it. I will sustain the objection.

Mr. Goodman: I am trying to show at one time he was operating as a common carrier at a higher rate, and when he started to operate as a contract carrier, he operated at a [fol. 451] lower rate.

Exam. Lawton: I thought we were going to go into that later.

By Mr. Goodman:

Q. Is your movement of freight between Louisville and Chicago and points in Illinois, coming to the time of July, 1935, very heavy?

A. Between Louisville?

Q. Between Louisville and points in Illinois, would you say that there was heavy traffic?

A. No, I would not say at that time. I would not say it was heavy traffic today. The operation of the bottling plant at Louisville has been spasmodic.

Q. What other companies have you used in the movement of your freight from Louisville, Kentucky, to points in Illinois?

Mr. Ellis: To which we object. What has that got to do with this, what common carriers have you used?

Exam. Lawton: Overruled.

The Witness: I do not care to divulge that because we have used common carriers into the territory, but they have been few and far between. It has been at the request, possibly of the consignees. That is information, I think, that belongs to the company and in view of certain conditions existing with respect to solicitation of traffic by the other motor carriers is to divulge who is getting business from us.

Exam. Lawton: Never mind, Mr. Luther, please. Make

[fol. 452] your answers specific in response to the questions.

The Witness: I am not going to divulge it.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

By Mr. Goodman:

Q. Approximately how many common carriers did you use out of Louisville, into points in Illinois?

A. Oh, possibly one, maybe two, something like that.

Q. You do not use them all in the operation between Louisville and points in Illinois, do you?

A. No, sir.

Q. Nowhere near all of them?

A. No, sir.

Q. Now directing your attention to about November, 1936, or between that date and January, 1937, isn't it a fact that you again confined practically every bit of your movement of freight from Louisville, Kentucky, to Chicago and points in Illinois that are served by Ziffrin Truck Lines, Incorporated, over the line of Ziffrin Truck Lines, Inc.?

A. Not as I know of.

Q. Wouldn't you know?

A. I wouldn't care to——

Exam. Lawton: Off the record.

(Discussion outside of the record.)

Exam. Lawton: Back on the record.

[fol. 453] By Mr. Goodman:

Q. What do you mean by, you would not care to?

A. Go back there.

Q. You would not say that was not true, would you?

A. What was not true?

Q. That practically all of the freight that was moved about November, 1936, moving from Kentucky to points in Illinois, practically exclusively via the Ziffrin Truck Lines, Incorporated?

A. Are you talking about my company or all of the companies out of Louisville?

Q. No, the movements of freight that moved for your company out of Louisville?

A. I said not to my knowledge.

Q. I say, you would not say, it is not true, would you?

A. I would not want to say that it was not, but knowing the contract that we have, I would not say that we did. The only thing that I could do would be to get the records and go back, and from my knowledge of going through the situation and checking up before appearing here, not from my knowledge, that happened.

Q. Then, prior to November, 1936, how many companies did you have moving freight out of Louisville to points destined in Illinois, how many different common carriers were there?

A. Prior to November 1st, possibly 36.

[fol. 454] Q. Yes.

A. I don't know that we moved stuff out of Louisville, Kentucky prior to November 1st, approximately 36.

Q. You were not moving any merchandise out of there?

A. Not at that time. I don't think we had our bottling plant in operation at that time.

Q. Did you have any distillery there?

A. Yes.

Q. Did you move anything out of your distillery?

A. No, sir.

Mr. Chandler: Mr. Luther——

Mr. Goodman: Mr. Chandler, I am cross-examining the witness.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Let us go back on the record.

By Exam. Lawton:

Q. Whether you moved any shipments out of your Louisville Distillery before November 1st?

A. November 1st, approximately 36.

Q. What was your answer?

A. I said I was not quite sure whether or not the bottling plant was operating at Louisville, Kentucky at that time.

By Mr. Goodman:

Q. You said probably there wasn't any movement out of the distillery at all?

A. I will make that statement. There was no movement out of the distillery at Louisville at that time.

[fol. 455] By Exam. Lawton:

Q. Well, then, would it be true that you did not use the applicant's services prior to November, 1936, out of Louisville?

A. Not outbound, possibly. I would not want to make a definite statement as to the date, but we did use the applicant's services into Louisville from Lawrenceburg. Now, there might have been, the applicant might have been used. I couldn't say unless I would check the records very closely on some merchandise that might have been moved from Louisville back to the Lawrenceburg distillery, might have been distress merchandise.

Q. You are not certain about that?

A. No, sir. I would not want to make a statement of which it might happen. We might move some back before July 1st, 1935 into Lawrenceburg. I would not want to make a statement about the volume of traffic our company has.

Exam. Lawton: Any further cross-examination?

Mr. Goodman: Yes.

By Mr. Goodman:

Q. Now, when you entered into this contract, November, 1936, with Ziffrin, did movements of freight from Lawrenceburg, move immediately upon the entering into the contract?

A. They moved prior to the contract, and on the contract, yes, sir.

Q. Now, during the negotiations of the contract, see if [fol. 456] I can refresh your recollection, would it be true after you entered into this contract, November, 1936, that no movement of freight moved until January, 1937, or thereabouts?

A. No, sir.

Q. You would not say that was true?

A. No, sir.

Q. When you were dealing with Mr. Ziffrin, the witness who testified this morning, you were dealing with Mr. Sam Ziffrin as an individual, as a responsible person, were you not?

Mr. Ellis: To which we object. The witness testified awhile ago that he knew the company that Mr. Ziffrin represented when he was talking to him. That point has been gone over before.

Mr. Goodman: This is a proper question. I am not going to dwell on it.

By Exam. Lawton:

Q. Do you understand the question?

A. If I knew Mr. Sam Ziffrin personally. Yes, sir.

By Mr. Goodman:

Q. In other words, when you were dealing with Mr. Ziffrin, it was not material as far as you were concerned what company you were dealing with, as long as Sam Ziffrin was back of it, it was not material to you?

A. No, sir.

Q. And, therefore, you mean you would not move any shipments of freight unless it was over his contract carrier?

A. No, sir. I knew who I was dealing with and the com- [fol. 457] pany he was representing when we talked.

Q. Did he come up to you and say to you "Mr. Luther, I, Sam Ziffrin, come here——

Mr. Ellis: We are going to object to any foolish questions, to this gentleman here.

By Mr. Goodman:

Q. —to you representing Ziffrin, Incorporated, and representing Ziffrin Truck Lines?

By Exam. Lawton:

Q. Do you understand who he represented?

A. Yes, sir. I understood that he represented Ziffrin, Incorporated, when I was talking to him.

By Mr. Goodman:

Q. Mr. Luther, when you saw the bills with Ziffrin Truck Lines appearing on your desk in Louisville, didn't you write Mr. Ziffrin and tell him you made a mistake. This was supposed to be moved over the lines of Ziffrin, Incorporated?

A. Mr. Ziffrin had nothing to do with putting it on the bills of lading, whether it was Ziffrin Trucking Company or on their freight bills.

Q. On the bill of lading?

A. He had nothing to do with putting it on the bills of lading.

Q. Who did?

A. The bills of lading were made up by our own people.

Q. You have seen Ziffrin Truck Lines on some of those bills of lading, isn't that true?

A. I think I have answered the question several times, yes.

[fol. 458] Q. What I would like to know, Mr. Luther, is simply this: did you give authority to the Ziffrin Truck Lines to move small shipments of freight for you?

Mr. Ellis: We are going to object to giving authority to the common carrier. The common carrier is open to anybody without any authority if they want to use it.

By Mr. Goodman:

Q. Did you contract with Ziffrin Truck Lines to move freight for your company?

Mr. Ellis: I am going to object to that. You can't contract with a common carrier.

By Mr. Goodman:

Q. Did you ship——

Exam. Lawton: Overruled. He has answered.

The Witness: Contracted through the regular bill of lading channels, yes, sir.

By Mr. Goodman:

Q. Did you speak with Mr. Ziffrin at that time, or did you just call up the company?

A. Did I?

Q. Yes.

A. No, sir, I did not speak to Mr. Ziffrin at that time.

Q. What member of your organization at Lawrenceburg, Indiana, has authority to call up different lines?

A. The traffic manager.

Q. What he does there as far as the movement of freight via common carriers would not be any concern of yours because the movements were small, is that right?

[fol. 459] A. To where?

Q. Well, the points in Illinois from Lawrenceburg to Chicago?

A. Yes, sir. It is a concern of mine.

Q. In other words, you would not call Ziffrin Truck Lines, Ziffrin, Incorporated would move freight from Lawrenceburg to Chicago?

A. Yes, sir.

Q. Or to points in Chicago?

A. Yes, sir.

Q. Now, when did you first begin moving freight via Ziffrin, Incorporated?

A. What?

Q. When did you first begin moving freight via Ziffrin, Incorporated?

A. I would say it was around—back around the first part of '34.

Q. '34?

A. Yes.

Mr. Goodman: That is all.

By Mr. LaTourette:

Q. Mr. Luther, how long have you been general Traffic Manager at Seagram?

A. Since February 1st of this year.

Q. 1938?

A. Yes.

Q. How long have you been at Louisville, Kentucky?

A. Since that time.

[fol. 460] Q. Since 1938?

A. Yes.

Q. Prior to that time, where were you located?

A. With the Calvert Distilling Company of Relay, Maryland, and St. Denis, Maryland.

Q. So what would happen at Louisville Distillery, what traffic was shipped from Louisville, you would have knowledge only as to the period from February, 1938, on, is that true?

A. Except to the records I have gone through.

Q. Yes.
A. Upon my arrival at Louisville.
Q. At Louisville?
A. Yes.
Q. You know nothing that transpired there prior to February, 1938?
A. Except for memorandums, or bills of lading, or information that is there.
Q. Yes.
A. I might state, if the Examiner would permit, there is no one in the company at the present time that I know of that could be put on the stand to testify as to exactly what took place prior to that time.

By Exam. Lawton:

Q. The point is, you were not there?
A. I was not there.

By Mr. LaTourette:

Q. You were not there?
[fol. 461] A. The only thing I have is the knowledge that I can gather from the correspondence and freight bills and memorandums which are in the files.
Q. You are not able to give anything more than the general testimony that you gave here as to original movements or shipments over the line of this applicant?
A. Prior to February 1st?
Q. Yes.
A. Since that time from the specific figures from the freight bills, and hte paid freight bills, was the information gained through billing secured.
Q. Yes.
A. If the Commission so desires, why, I would be glad to go back through the record and pick out different dates to show movements, if they want it in the record.
Q. Your principal knowledge extends from February, 1938?
A. Yes.

Mr. LaTourette: That is all.
Exam. Lawton: Any further cross-examination?
(No response.)

By Exam. Lawton:

Q. Then, you now have, I understand, a written contract running with the applicant?

A. Yes, sir. Yes, sir, that was entered into, I think, the exact date was November 16th, 1936. We still have that.

Q. That is on behalf of the Seagram Companies?

[fol. 462] A. Seagram Companies.

Exam. Lawton: Anything on redirect?

Mr. Ellis: Step aside.

Exam. Lawton: You are excused.

(Witness excused.)

Exam. Lawton: We will recess at this time until 1:30.

(At 12:05 p. m. a recess was taken until 1:30 o'clock p. m.)

Afternoon Session. 1:30 p. m.

Exam. Lawton: Are you ready to proceed, gentlemen? If so, we will come to order. All right, Mr. Ellis, call your witness.

EDWARD GUSKY, was sworn and testified as follows:

Direct examination.

By Mr. Ellis:

Q. Your name is Edward Gusky?

A. Edward Gusky, that is right.

Q. Where do you live, please?

A. Hotel Roosevelt, New York City. May I also put into the record that I am a practitioner registered to appear before the Interstate Commerce Commission, which I failed to do at the beginning of the hearing.

Q. Yes. If you are connected with any business or manufacturing company, or companies, I wish you would state [fol. 463] what it is, and what your connection is.

A. I am general traffic manager of the Schenley Distillers, Incorporated, and the Schenley Distillers, Incorporated, own and control the following distilleries and companies here: Schenley Products Company, New York; Schenley Import

Corporation, New York; Schenley Distillers Corporation, San Francisco.

By Mr. LaTourette:

Q. That second one was what?
A. Schenley's Import Corporation.
Q. New York?
A. Yes, sir.
Q. The third one?
A. Schenley Distillers, Incorporated, San Francisco.

Mr. LaTourette: Thank you.

The Witness: Schenley Distillers, Incorporated, Schenley, Pennsylvania; Joseph S. Finch Company, Schenley, Pennsylvania; Old Quaker Company, Lawrenceburg, Indiana; New England Distilling Company, Covington, Kentucky; George P. Stagg Company, Frankfort, Kentucky; James Pepper Company, Lexington, Kentucky; Berhnheim Distilling Company, Louisville, Kentucky; Belmont Distilling Company, Louisville; George Dickel & Company, Levington, Kentucky; Steinhart Company, New York City.

Q. Does that complete the list?

A. No, it does not. There are several other corporations which I am not going to name at this time.

[fol. 464] Q. All of those companies that you have mentioned are distilleries of the parent Schenley Company, and the Schenley Company itself engaged in the manufacture, sale and distribution of alcoholic liquors?

A. Alcoholic liquors; I meant to say importation, if that is necessary, as a manufacturer, importation and sale.

Q. Take for example some brands of Scotch whiskey which are not made in the United States, do you import them?

A. Yes.

Q. And sell them and distribute them here?

A. That is right.

Q. How long have you been general traffic manager for the Schenley Company?

A. General traffic manager for two months, two months.

By Exam. Lawton:

Q. How long?
A. Two months.

By Mr. Ellis:

Q. Prior to that time, what was your position, Mr. Gusky?

A. Assistant general traffic manager.

Q. How long were you assistant general traffic manager?

A. Since January, 1934.

Q. As assistant general traffic manager, I will ask you whether or not the arrangement for your supervision of the transportation of your products by motor vehicle in interstate commerce was directly under your personal supervision and direction?

[fol. 465] A. That is right. I have plant managers, we instruct, from New York, and the orders pass through the New York traffic department and on to the distillery.

Q. Mr. Gusky. I want to direct your attention to that part of the United States included in an area in the state of Kentucky, within a radius of approximately 150 miles from Louisville, Kentucky, all of the state of Indiana, all of the state of Illinois, all of the state of Ohio, St. Louis, Missouri, Milwaukee, Wisconsin, and that part of the state of Pennsylvania in and around Pittsburgh and Schenley, Pennsylvania. Do you have that territory in mind?

A. Yes.

Q. Do you sell and distribute your alcoholic liquors in that territory?

A. We do.

Q. Have you been so engaged since the repeal of the 18th Amendment?

A. In the distribution, yes. We manufactured wiskey under a permit prior to the advent of repeal, that we distributed it in the territories where the sale of liquors was legal at that time.

Q. Are a number of the Schenley distilleries those which have been in existence for a great number of years?

A. Several of them, yes.

Q. Directing your attention again to the territory which [fol. 466] you have just indicated you are familiar with, I will ask you what units or companies of the Schenley organization have distilleries or rectifying plants, or whatever you distillers call them, in the territory, will you describe them, where they are, such as Lawrenceburg, Indiana?

A. You mean where we have distilleries?

Q. Yes.

A. At Lawrenceburg, Indiana, Frankfort, Kentucky, Lexington, Kentucky, Louisville, Kentucky, Covington, Kentucky, and Schenley, Pennsylvania.

Q. Are those companies, particularly those which you have mentioned in the state of Kentucky, do they maintain separate identities for the purpose of maintaining their own established brands, such as Pepper, or something of that kind?

A. Yes. They are bottled under the name of the distillery, but they are a division of the Schenley Products Company. In other words, it would be the Old Quaker Company, Division of Schenley Company.

By Exam. Lawton:

Q. By the way, how long have these plants been in these places?

A. I would say the plant of the Old Quaker Company, which was formerly the Squib plant, which I understand was in Lawrenceburg many, many years.

Q. I mean, how long does your company, where your affiliated companies——

[fol. 467] A. Have control?

Q. Yes.

A. Since 1933.

By Mr. Ellis:

Q. If I understand right, Mr. Gusky, all of the distilleries which are divisions of Schenley, which you have mentioned in this territory, have been under the control and division of Schenley since 1933, is that correct?

A. That is correct. Excuse me, with the exception of Louisville, Bernheim at Belmont, that was a year, about a year ago.

Q. Those distilleries were in operation prior to the time you have acquired them?

A. Yes.

By Mr. LaTourette:

Q. As to all the others, do we understand you to say they have been controlled since 1933?

A. Let me see, with the exception of Bernheim, Belmont and George A. Dickel.

Q. Bernheim is at Louisville?

A. That is right.
Q. What is the next one?
A. Belmont Distilling.
Q. Where is that located?
A. Louisville.
Q. Louisville?
A. Yes.
[fol. 468] Q. Where is the first one located, the first one you mentioned?

Exam. Lawton: You mean the last one?
The Witness: George Dickel?

By Mr. LaTourette:

Q. Yes.
A. Lexington.
Q. That has been controlled how long?
A. That has been about a year.
Q. Are there any others that have been recently controlled?
A. No, no others.
Q. There is just two?
A. Three.
Q. Lexington and Louisville?
A. And Louisville.
Q. Three, two at Louisville?
A. Yes.

Mr. LaTourette: Thank you. Pardon me.
Mr. Ellis: Surely.

By Mr. Ellis:

Q. I want to direct your attention, Mr. Gusky, to the applicant in this case, Ziffrin, Incorporated. Are you familiar with that company?
A. I am.
Q. I want to direct your particular attention to that period on and about July 1, 1935. Do you have that in mind?
A. I did.
Q. I will ask you whether or not on or about July 1, [fol. 469] 1935, before that date, and since that time, up to the present time, you used and have used the services of Ziffrin, Incorporated, under contract for the transportation of alcoholic liquors in interstate commerce by motor

vehicle in the territory which you have heretofore identified?

Mr. LaTourette: Just a moment. We object to that question, Mr. Examiner, on the same ground. I do not think I need repeat them.

Exam. Lawton: Overruled. He may answer.

By Mr. Ellis:

Q. What is your answer?

A. We have.

Q. I want to direct particular attention to Schenley, Pennsylvania. Does that have any connection with your company, the similarity of names, is there any reason for that?

A. Give that question again.

Mr. Ellis: Read it.

(Question read.)

The Witness: Yes. It is our company. It was in operation and used trucking companies during that period.

By Mr. Ellis:

Q. In your use of the services of Ziffrin, Incorporated under contract in interstate commerce, on, before and since July 1, 1935, has the movement of alcoholic liquors been from the distillery, rectifying plant, or whatever it may be called, to distribution points alone, or has there been a return movement of alcoholic liquors to your various [fol. 470] destinations?

Mr. LaTourette: May it be understood the same objections runs to this testimony?

The Witness. There has been a movement of alcoholic liquors in both directions, from warehouse to distillery, and distillery to various places.

By Mr. Ellis:

Q. For example, I will ask you whether or not you have had a movement in both directions between Lawrenceburg and Frankfort, Kentucky?

A. We have.

Q. Did you use the services of Ziffrin, Incorporated, for that movement on, before and since July 1, 1935?

A. We have.

Q. Directing your attention to distillers' supplies, has Ziffrin, Incorporated, transported that sort of article, commodity for you in interstate commerce in this territory on, before and since June 1, 1935?

A. Yes, they have.

Q. Is that a movement away from the plant, or is that a movement to the plant and point of manufacture?

A. It has been a movement to the plant.

Q. What is the nature of those supplies, Mr. Gusky?

A. Well, the bulk of it is bottles, bottles, Alton, Illinois; Dunkirk, Indiana; Indianapolis, Terre Haute, Winchester; and glue from Chicago.

[fol. 471] Q. Has your use of Ziffrin, Incorporated, on before and since July 1, 1935, been to only a few central distribution points in the territory heretofore described, or has your use been general throughout that territory?

A. It has been general.

Q. Has the service of Ziffrin, Incorporated, been satisfactory to your company?

A. Very satisfactory.

Q. Do you desire to see it continue?

A. Absolutely?

Mr. LaTourette: Just a minute. Are we going into the case involving consistency of public interest? If we are, that is a proper question. If we are not, it is improper and it has no place.

Exam. Lawton: I think it is irrelevant at this time.

Mr. Ellis: What?

Exam. Lawton: I think it is irrelevant at this time.

Mr. Ellis: I will withdraw it at this time.

Exam. Lawton: Two separate issues.

By Mr. Chandler:

Q. Mr. Gusky, you also manufacture alcohol, do you not?

A. That is right.

Q. Among these commodities, Ziffrin, Incorporated, has moved alcohol, has it not?

A. That is right, alcohol and drums.

Q. I just want that matter in the record.

[fol. 472] A. I might add to that, occasionally alcohol in glasses.

Q. That would make alcohol in barrels, in metal cans or in glasses?

A. That is right.

By Mr. Ellis:

Q. Mr. Gusky, have you made any study or compilation from your records indicating, or showing, referring to which you can testify as to some of the destination points to which you have used the services of Ziffrin, Incorporated, on or about, before and since July 1, 1935, in this territory?

A. Yes, sir, I can. I can't name specific quantities, that is, the cases, but we had the pro numbers, and I know we shipped into the state of Ohio day in, and day out, and it has been so on, and before July 1, 1935; also in several points, also to most every point in the state of Illinois, every city in the state of Illinois.

Q. How about Indiana?

A. Indiana, most every point in Indiana. We have also shipped into Racine, Milwaukee, St. Louis, Missouri.

Mr. LaTourette: We move to strike that on the ground that the records would be the best evidence. This testimony is purely incompetent in weight.

By Exam. Lawton:

Q. Can't you make that a little more specific as to cities in Illinois and Indiana?

A. I have a list here I have reviewed. After reviewing [fol. 473] this list, I feel I am safe in saying we have shipped to each one of these points listed here in this paper.

By Mr. Ellis:

Q. Will you state what those points are, Mr. Gusky?

Mr. LaTourette: We again object, Mr. Examiner, on the same ground in connection with the testimony of the previous witness who attempted to introduce a list of points of that time, but the Examiner said he would not receive it at this time.

Exam. Lawton: This witness says he has charge of the records.

By Exam. Lawton:

Q. May I ask if that is compiled from your records?

A. This is to the best of my recollection, yes, sir.

Q. Do you recall any specific dates in connection with it?

A. The dates I can recall. I believe the best way, if counsel there wants to check into this, he could get his rec-

ords from the individual states. I believe the tax department have the records of liquor shipped into the states for those particular years. They could identify the shipping point by the brand of the whiskey.

Q. Do you know whether those shipments were made before July 1 or since?

A. They have been before and since.

Q. Can you segregate them and show which ones were [fol. 474] made before and which ones were since?

A. No, I couldn't safely say it.

Q. So that would be worthless, wouldn't it, for our purposes?

A. I would not say it would be absolutely worthless. We have shipped a considerable quantity of merchandise. I know these points are the ones to whom we have been sh-p-ping. We been shipping to them week in and week out since and before July 1st, 1935.

Q. Let me ask you one more question. Those shipments to distilleries are to retail dealers?

A. In the states of Illinois, Indiana, Kentucky and Missouri, they are to the distributors and the distillers. In the state of Ohio, we ship to the warehouse which we call bailment stock, and the state of Ohio pays us. That stock we release in the state of Pennsylvania, we sell direct to the state.

By Mr. Chandler:

Q. What about the state of Wisconsin?

A. The state of Wisconsin, that is direct to the wholesaler.

By Mr. Latourette:

Q. I move to strike the testimony on the ground it has no probative value. It does not inform the parties as to the claims made by the applicant.

Mr. Ellis: We are not here to inform you. We are here to inform the Interstate Commerce Commission.

Mr. LaTourette: I think you are here for the record, to inform us so that we know what the issue is.

Exam. Lawton: If you will have this fixed as a proper [fol. 475] exhibit, describing what it is, I will receive it for what it is worth. Have it properly made up.

Mr. Goodman: Did I understand the witness to say that was prepared from his books and records?

Exam. Lawton: I understood him to say so.

The Witness: That is right.

Mr. Ellis: Will you mark this exhibit No. 3, please.

(Applicant's exhibit 3 marked for identification.)

By Mr. Ellis:

Q. Mr. Gusky, I hand you a paper which for the purpose of identification, has been marked exhibit 3, and ask you if that shows some of the points to which you have used the services under contract of Ziffrin, Incorporated, in interstate commerce transporting alcoholic liquors on, or about or before and since July 1, 1935?

Mr. LaTourette: Just a minute. The witness, in response to the Examiner's question, said he couldn't say which was before July 1st, and which was after.

Exam. Lawton: That is right, that was his answer. That is correct, isn't it? You can testify generally on those points.

The Witness: I meant to say that, I thought I said that we shipped to all of these points before, after and on July 1st, 1935.

By Exam. Lawton:

Q. That is your testimony now?

A. That is right.

[fol. 476] Q. All of them?

A. Yes, that is right.

Exam. Lawton: All right.

Mr. Ellis: We will have additional copies in a little better form, and hand them to the parties later. You may cross-examine.

Cross-examination.

By Mr. LaTourette:

Q. Mr. Gusky, the document that has been identified as applicant's exhibit No. 3 is the same document that a prior witness sought to introduce, is that right?

A. That is right. I believe it is. I didn't see what he introduced.

Q. Isn't this an exact duplicate of the statement of Mr. Chandler who attempted to introduce it in evidence on his direct testimony?

Mr. Ellis: I am going to object to that because Mr. Chandler did not attempt to introduce anything in this record in the way of an exhibit.

Exam. Lawton: I don't think he did.

By Mr. LaTourette:

Q. Is this the same statement that Mr. Luther, in his direct testimony attempted to introduce in evidence?

Mr. Ellis: I am objecting to that because Mr. Luther did not attempt to introduce any exhibit.

[fol. 477] Exam. Lawton: It seems to me it would be immaterial.

Mr. LaTourette: Mr. Examiner, the reason for the entry is apparently, this statement prepared from some one else's record other than the company for whom this witness appears, and it seems to be the same statement that a prior witness sought to introduce, and which you on my objection refused to receive it. I am simply attempting to show that as evidence of the fact that the exhibit really contains information which was alleged to have been taken from some other books and records.

Exam. Lawton: Off the record.

(Discussion outside the record.)

By Mr. LaTourette:

Q. Did you receive this particular statement marked applicant's exhibit 3, from Mr. Ziffrin, in the hearing room this morning?

A. It was made up by him, yes.

Q. By Mr. Ziffrin?

A. By his secretary at my request.

Q. You did not take it from your records; you took it from his records?

A. Took it from his records, that is true.

Q. When did you first enter into a contract with Ziffrin, Incorporated, Mr. Gusky?

A. I will say in 1934.

Q. Did you have a written contract, or verbal contract?

[fol. 478] A. Verbal contract at that time.

Q. When did you have first a written contract?

A. I believe it was in 1936.
Q. 1936?
A. Yes.
Q. As a matter of fact, isn't it true you have very little information as to whether or not shipments did or did not move under either verbal or written contract you had with Ziffrin, Incorporated?
A. I would not say that is true, no.
Q. You have no direct specific knowledge as to movements either under the verbal contract, have you?
A. No, I couldn't make any reference to any specific particular shipment, no.
Q. And you are not here seeking to testify with respect to movements to or from Lexington, nor the two distilleries at Louisville, which you say you control beginning with about a year ago, insofar as shipments on July 1, 1935, from those points are concerned?
A. No, I am not.
Q. In other words, your company had no connection with those two distilleries, those two at Louisville, and Lexington distillery?
A. When you say Lexington, that is Dickel. We have had James Pepper there which we have had for sometime.
[fol. 479] Q. James E. Pepper?
A. James E. Pepper, yes.

Mr. LaTourette: That is all.

The Witness: In connection with that exhibit, you do not have Cincinnati on there, which was on the original paper which I have.

By Exam. Lawton:

Q. Mr. Gusky, did I understand you to say that you formerly had a verbal agreement with the applicant?
A. That is true.
Q. Are you the person who dealt with the applicant for your firm?
A. No, not at that time, but I was there at the time.
Q. Who made the dealings with the applicant?
A. Mr. A. W. McElvain.
Q. He is not present?
A. No. He is deceased.
Q. You say you were present at the time?
A. I was present at that time.

Q. You represented the applicant in these dealings with respect to the transportation for your company, if you recall?

A. Represented the applicant?

Q. Yes, Ziffrin, Incorporated?

A. Sam Ziffrin.

Q. Yes. You may also state, if you recall, what the [fol. 480] nature of these verbal agreements were. Did they extend for any period of time, or were they entered into from time to time?

A. They were entered into from time to time, not on each individual shipment.

Q. Was it similar to the one Mr. Luther described this morning with respect to his company? Pardon me. Or Mr. Chandler?

A. Yes.

Exam. Lawton: Any redirect examination?

Mr. Goodman: Just a moment.

By Mr. Chandler:

Q. I want to ask Mr. Gusky about this list of the different points that you shipped into. You say that this list was compiled for you by whom?

A. By Ziffrin's Secretary, not his secretary, but the boy we spoke to.

Q. Is this a copy of your records on file in New York?

A. That is right.

Mr. LaTourette: I object to that, Mr. Examiner. This is an attempt to have this witness stultified by himself.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record.

The Witness: The bills of lading which Mr. Ziffrin has in his files, which I went over, and these points here, are a reproduction of my signed copy, his signed copy of the [fol. 481] bill of lading by our traffic manager.

Mr. LaTourette: Of course, your Honor, I am going to object further to the introduction of the exhibit on the ground that it is not properly supported, and it can have no weight in view of the statement the witness just made.

The Witness: I will tell you something more, Mr. Counsel.

Exam. Lawton: Off the record.

(Discussion outside of the record.)

Exam. Lawton: On the record.

By Exam. Lawton:

Q. Did you check that list with the record of Mr. Ziffrin's office personally?

A. Yes. This list was compiled when I was there. As a matter of fact, I helped to compile it.

Q. How did you recognize the name of your company on there? Are you familiar with the signature?

A. Yes. We have our own form of bill of lading.

Q. Well, are you familiar with the signatures that are on these bills?

A. I am.

Q. You are willing to swear that these were authentic copies of your own bills?

A. I am.

Exam. Lawton: Well, I will receive it.

(Applicant's exhibit No. 3, witness Gusky, received in [fol. 482] evidence.)

Mr. LaTourette: Note my exception, Mr. Examiner, on the ground stated.

Exam. Lawton: All adverse rulings have exceptions noted.

By Mr. Goodman:

Q. In the movement of whiskey to points in Illinois, did you ever use Ziffrin's Truck Line?

A. To points in Illinois?

Q. Yes.

A. From where?

Q. Well, from Kentucky, or Lawrenceburg?

A. We have used them on several shipments, small shipments.

Q. Did you use them both at the same time, or did you first use the Ziffrin Truck Lines, and then change over to Ziffrin, Incorporated?

Mr. Ellis: I am going to object to that. The witness testified himself there is no such interpretation. It is to the effect he used this common carrier for small l. t. l. shipments.

Exam. Lawton: Just a moment. He has not testified to that point yet.

The Witness: I will tell him it was less than truckload shipments, about 100 cases.

By Exam. Lawton:

Q. Did you use the common carrier to some extent?
A. To some extent.

[fol. 483] Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

By Mr. Goodman:

Q. And the rate charged, the l. t. l. rate, no, strike that. Do you know whether or not in November, 1936, when you entered into the contract with Ziffrin, Incorporated, that prior to that time, practical- all of your movement of whiskey moved into Chicago via Ziffrin Truck Lines?

A. Prior to that time?

Q. Yes, prior to November, 1936.

Exam. Lawton: Understand now he is referring to the common carrier.

By Mr. Goodman:

Q. You would not know that to be a fact, would you? You would not know whether or not that were true, would you?

A. I would say no.

Q. In other words, you don't know?

A. Ask me the question again.

Q. Yes.

A. I am a little confused.

Q. Prior to November, 1936, isn't it a fact that all of the movements of whiskey that moved into points in Illinois from Lawrenceburg, Indiana, and from Louisville, Kentucky moved via Ziffrin Truck Lines?

[fol. 484] A. No. That is not true.

Q. The greater portion of it did?

A. Ziffrin, Incorporated.

Q. You say that most of it moved by Ziffrin, Incorporated?

A. All of it moved by Ziffrin, Incorporated, with the exception of less-than-truckload shipments of 100 cases and less.

Q. Does it move that way today?

A. Moved on Ziffrin, Incorporated.

Q. Ziffrin Incorporated, and Zuffrin Truck Lines both, that is, on the l. t. l. it moves Ziffrin Truck Lines?

A. For the past several years we have not had less-than-truckload shipments. It is all in pooled shipments of truckloads.

Q. Were the contracts that were made, made in your presence?

A. The contracts to——

Q. The written contracts or oral contracts, I mean?

A. Yes.

Q. And where was the written contract executed?

A. It was executed, of course, by our officials, in New York.

Q. In New York. Are you acquainted with the contract?

A. I am acquainted with the contract, yes.

Q. Isn't it a fact, Mr. Gusky, that prior to the execution of this contract that the Ziffrin Truck Lines was shipping whiskey for you at a 38 cent rate?

A. 38? I can't pass on the rate feature of it, because [fol. 485] I can't keep a record of every rate that we have to each of our destinations.

Q. Isn't it a fact, then, in 1936, when you entered into this contract, you got a reduction in rate?

Mr. Ellis: We object to that. He is trying to find out what is in this private contract.

Exam. Lawton: It has been asked and answered by other witnesses. You may answer.

The Witness: I believe we did.

By Exam. Lawton:

Q. In other words, the contract charge was less than that of a common carrier, is that right?

A. That is right.

By Mr. Goodman:

Q. Then, after this contract was entered into in November, 1936, your company made an agreement with Mr. Ziffrin to give him all the business out of Kentucky, did they not, to points in Illinois?

Mr. Ellis: I object to introducing Mr. Ziffrin. He is not at issue in this case. You said, made a contract with Mr. Ziffrin. You are talking about a company here.

By Mr. Goodman:

Q. Was there an agreement between your company and Ziffrin Truck Lines, the common carrier company, to give them all the business that moved out of Louisville?

A. Out of Louisville?

Q. Yes, out of Louisville?

A. What date?

[fol. 486] Q. After November, 1936, when you entered into this contract?

A. That is right. I would not say all of the business but business to these specific points.

Q. Business to the points that the common carrier company had the rights into?

A. Well, points that we had designated to which the contract applied.

Q. The movements out of Louisville, moved at common carrier rates. They moved via the Ziffrin Truck Lines. That is right, isn't it?

A. I am just trying to get my dates straight.

Q. That was after the entry into this contract of November, 1936?

A. Let me get straight. When we opened our Louisville plant our contract was amended to include Louisville.

By Exam. Lawton:

Q. What contract are you speaking of?

A. Ziffrin, Incorporated, contract.

Q. Is that the contract you have in mind in your answer to Mr. Goodman's question?

A. That is right.

By Mr. Goodman:

Q. I understood you to say that the movement of freight out of Louisville, Kentucky, after 1936, after the execution

of this contract you are speaking of, moved via the Ziffrin Truck Lines, a common carrier company?

A. That is on less than 100 cases, less than 5,000 pounds.

[fol. 487] Q. Prior to that time the Ziffrin Truck Lines did not get all of your business out of Louisville?

A. Our plant had only been in operation down there less than a year.

Q. Will you answer my question, Mr. Gusky?

A. I couldn't tell you about any movements that did not exist.

Q. Well, then, when was that plant open? I beg your pardon.

A. I think we had that plant open about nine months.

Q. About nine months?

A. That is right.

Q. Well, now, from your other plants in Kentucky, there was an agreement by your company and the Ziffrin Truck Lines?

A. Not Ziffrin Truck Lines, Ziffrin, Incorporated.

Q. Well, there was an understanding, then, let us say, between your company and Mr. Sam Ziffrin, that all of the freight that moved out of Kentucky going through Louisville into points in Illinois would be brought into Louisville and interchanged with the Ziffrin Truck Lines?

Mr. Ellis: I am going to object.

By Mr. Goodman:

Q. The common carrier company, isn't that true?

Mr. Ellis: I object to any questions about any understanding with Mr. Ziffrin, individually.

Exam. Lawton: Read the question.

(Question read.)

[fol. 488] The Witness: I am going to refuse to answer that on the ground it is of a personal note. I won't answer it.

Mr. Goodman: That is all.

Exam. Lawton: Any further cross-examination?

By Mr. Chandler:

Q. I would like to ask a question. Mr. Gusky, you were asked if you gave your tonnage out of Louisville to the con-

tract carrier Ziffrin, Incorporated, and took this business away from any common carriers. I would like you to further qualify that statement by answering this question: whether any points in this territory that were not served by common carriers with adequate protection for your companies?

Mr. LaTourette: Well, now, we object to that question. If you are going into the question of consistency of public interest, then, such an entry is relevant. I understand this is a grandfather case.

Exam. Lawton: Off the record.

(Discussion had outside the record.)

Exam. Lawton: On the record. Are there any further questions?

By Mr. LaTourette:

Q. I have one more question that is suggested by a previous question directed to the witness in his answer. Do I understand you to say, Mr. Gusky, that only in the case of shipments of less than 100 cases of liquor, did you use Ziffrin Truck Lines?

A. That is right. We did use them.

Q. Are you sure of that?

[fol. 489] A. Positive.

By Exam. Lawton:

Q. One hundred or more?

A. One hundred or more, with Ziffrin, Incorporated, and less than one hundred with Ziffrin Truck Lines.

By Mr. LaTourette:

Q. In one hundred or less, you used Ziffrin Truck Lines, Incorporated?

A. Yes.

Q. In no cases where there were one hundred cases or more, did you use Ziffrin Truck Lines, Incorporated?

A. From which points?

Exam. Lawton: Just a moment. Off the record.

(Discussion outside the record.)

By Mr. LaTourette:

Q. Is that clear? In other words, when they ship one hundred cases or more, you use only Ziffrin, Incorporated, is that right?

A. That is right, from Louisville.

Q. From Louisville?

A. From Lawrenceburg, and we did from Frankfort until, I understand in '37 Ziffrin was prohibited from using his Ziffrin, Incorporated from Frankfort points in CFA territory.

Q. Let me get this straight then. As I understand your testimony, when you do ship 100 crases or over from Louisville, they move by Ziffrin, Incorporated, is that right?

A. Yes.

Q. And where you had 100 cases or less, from Louis-
[fol. 490] ville, they move on Ziffrin Truck Lines, Incorporated?

A. Yes. That is right, where the minimum of 5,000 pounds was concerned, or the 5,000 pound minimum gave you a contract rate we shipped as 5,000 pounds.

Q. You say where you got a contract rate for 5,000 pounds, you would ship 5,000 pounds by Ziffrin, Incorporated?

A. Yes.

Q. Are you changing your statement in case where it was 100 cases or less, you don't ship them by Ziffrin Truck Lines?

A. I will say, instead of 100 cases, 5,000 pounds. It is the same thing.

Q. Are we to understand as to shipments weighing 5,000 pounds or less, it is moved by Ziffrin Truck Lines, Incorporated?

A. Some of them.

Q. Some of them?

A. Yes.

Q. As to 5,000 pounds or over, they move Ziffron, Incorporated, from Louisville?

A. That is right.

Q. What was the situation about Lawrenceburg?

A. The same thing.

Q. That Ziffrin Truck Lines never hauled anything from Lawrenceburg unless it was 5,000 pounds, or less, is that right?

A. Ziffrin, Incorporated, that is right.

Q. Are you just as sure of that as you said you were sure [fol. 491] of your examination of your other records?

A. That is right.

Q. Have you examined the bills of lading issued by Ziffrin Truck Lines, by Ziffrin, Incorporated to Seagram to determine whether or not you shipped over Ziffrin Truck Lines, shipments of 100 cases?

Mr. Ellis: To which we object. The gentleman is not connected with Seagrams.

By Mr. LaTourette:

Q. Schenley's?

A. Yes, I have.

Q. And it is your information that there were no shipments of over 100 cases that moved via Ziffrin Truck Lines, Incorporated? Do you understand that question?

Mr. Ellis: Which question are you asking?

Mr. LaTourette: I will have the court reporter read it.

Mr. Ellis: There are two questions.

By Mr. LaTourette:

Q. Let us see those two questions now.

A. When you say Ziffrin Truck Lines, Inc., what do you mean, Ziffrin, the common carrier, the common carrier?

Q. I mean the common carrier.

A. The common carrier, well, there might have.

Q. There may have been cases where over 100 cases?

A. There might have been, yes.

Q. So that as to some origins, both the common and con- [fol. 492] tract carrier served you both in the capacity of over 100 cases and less?

A. I would not say that. What origin do you mean? What point of origin do you have reference to?

Q. We were talking about Louisville just a minute ago.

A. Yes.

Q. Now, Louisville, in the case of Ziffrin Truck Lines, Incorporated, the common carrier?

A. Yes.

Q. You say there may have been shipments of over 100 cases as well as shipments of 5,000 pounds and over that moved via that line to Louisville?

A. That is right.

Q. Then, I understand you to say also with reference to Ziffrin, Incorporated, from Louisville, there may have been shipments of 5,000 pounds, if you got a contract from Ziffrin on it as well as shipments of 100 cases or over, that is true?

A. That is right.

Q. Now, tell us whether or not that situation prevails to points other than Louisville, Kentucky?

A. No, Lawrenceburg, Indiana, and Louisville.

Q. Lawrenceburg, Indiana and Louisville?

A. Yes.

Q. That is the situation?

A. Yes.

[fol. 493] Q. How about shipments from Frankfort, Kentucky?

A. They are all on common carrier rates right now.

Q. They are all on common carrier rates right now?

A. Yes.

Q. Ziffrin does not serve you, Ziffrin, the contract carrier, does not serve you?

A. He did serve us. We had a contract with Ziffrin from Frankfort.

Q. All your shipments are moved on Ziffrin Truck Lines, the common carrier?

A. At the present time.

Q. Taking the movements from Covington, Kentucky, is Ziffrin Truck Lines, the common carrier, handling those shipments?

Mr. Ellis: I want to just make this observation, and then I have an objection to this. It is just going into this field. I have been shut off every time. Do you want to keep this up? All right, then, let us bring it up. Otherwise, let us wait until we get to that feature of the case.

Exam. Lawton: I think your position is well taken, Mr. Ellis.

Mr. LaTourette: What is that?

Exam. Lawton: I think Mr. Ellis' point is well taken, we are trying to segregate the issue. Now, you got them mixed up.

Mr. LaTourette: I thought this was very pertinent in [fol. 494] this connection, Mr. Examiner, that the witness testified with respect to hauling by Ziffrin, Incorporated,

the contract carrier, on July 1, 1935, and continuously since that time. Now, he testified as to certain points, shipments are now moved from, via Ziffrin Truck Lines, the common carrier, indicating the service of the contract carrier has ceased from those origins. That is the reason I was attempting to find that out. Off the record.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

Mr. LaTourette: If I abandon this line of examination, I would like counsel to make that statement. Then, I will not have to proceed further in my examination of this witness as to whether or not service is at the present time being obtained from points other than——

Mr. Ellis: It is already in the record with Mr. Ziffrin's testimony. I think it is better than my statement.

Exam. Lawton: I think that is right. That is, that you have not been since August, 1937, operating from points in Kentucky.

Mr. Ellis: Other than Louisville.

Mr. Goodman: Isn't there going to be a discrepancy in the record in view of the fact of my cross-examining the witness developed the fact that the agreement began, the [fol. 495] movement of freight coming out of Kentucky points going to Louisville, Kentucky, and going into points in Illinois, that movement of freight began in 1936 by common carrier operation, and the agreement between Mr. Snodgrass, and Mr. Ziffrin, I think, took place as stated on August 23rd, 1937. So I think Mr. Commissioner, Mr. LaTourette is perfectly correct in pursuing the line of examination to show there was a contract carrier operation out of Kentucky points into other points prior, or after November, 1936.

Exam. Lawton: The applicant has stated there was none after August, 1937.

Mr. Goodman: None after November, 1936?

Mr. Ellis: There is no such statement in the record. The only question that this witness refused to answer is when you asked him about some agreement with Mr. Ziffrin personally.

Exam. Lawton: Let us get on with the testimony in the examination.

Mr. Ellis: Mr. Gursky, one other question:

Redirect examination.

By Mr. Ellis:

Q. You testified that this written contract was entered into with the applicant, Ziffrin, Incorporated, sometime in 1936 when the Commission's rules and regulations required that. Now, did you have a verbal contract with the applicant on July 1, 1935, and prior to that time, and up to '36? [fol. 496] A. We did.

Q. Mr. Gusky, have you any knowledge that you ever gave Ziffrin Truck Lines any shipment in cases of 5,000 pounds?

A. No, I couldn't say that I have.

Mr. Ellis: That is all.

By Exam. Lawton:

Q. Mr. Gusky, where were you about July 1, 1935?

A. July 1, 1935?

Q. Where were you located at that time?

A. At 20 West Fortieth Street, New York City.

Q. New York City?

A. Yes.

Q. Were you out in this territory at all during that period?

A. No.

Q. July 1, and after that?

A. No.

Q. Your knowledge of the dealings of your company with applicant is gained entirely from your office records and correspondence, is that correct?

A. No, I would not say that, Mr. Examiner. I handle largely the detail of the traffic department.

Q. Do you have any personal contact with any representative of the applicant?

A. Yes.

Q. In 1935?

A. He called at our office. We discussed the agreement [fol. 497] and the contract.

Q. Who called at your office?

A. Mr. Ziffrin.

Q. That was in 1935?

A. That is right.

Exam. Lawton: If there is nothing further, you may be excused.

Mr. Ellis: Step down, Mr. Gusky.

(Witness excused.)

Exam. Lawton: We will take just a short recess, gentlemen.

(A short recess was taken.)

F. F. GILBERT, was sworn and testified as follows:

Direct examination.

By Mr. Ellis:

Q. Have you given your name to the reporter, Mr. Gilbert?

A. I have.

Q. Where do you live?

A. Chicago.

Q. If you are connected with any business concern, state what it is, and your capacity with it, please?

A. I am assistant to the traffic manager of Swift & Company, and Swift's subsidiaries.

Q. Is the principal office of Swift & Company and these subsidiaries located in Chicago, Illinois?

[fol. 496] A. It is.

Q. Is Swift & Company, a nationally known meat packer and dealer in packing house products and similar allied articles?

A. Yes, sir.

Q. I want to direct your attention to that part of the United States, including 150 mile radius around the city of Louisville, Kentucky, in the state of Kentucky, all of the state of Indiana, all of the state of Illinois, all of the state of Ohio, St. Louis, Missouri, Milwaukee, Wisconsin, Pittsburgh and Schenley, Pennsylvania. Do you have that territory in mind?

A. Yes.

Q. I want to direct your attention to the applicant in this case, Ziffrin, Incorporated, are you familiar with that company?

A. Yes, sir.

Q. I direct your attention to the period on and about July 1, 1935. I want to ask you whether or not your company, Swift & Company, used the service of Ziffrin, Incorporated, under contract, for the transportation of your products in interstate commerce by motor vehicle in the territory that you identified a moment ago?

Mr. LaTourette: To which we object, Mr. Examiner, on the same grounds as previously. This is not competent testimony.

[fol. 499] Exam. LaVeton: Overruled. He may answer.

The Witness: We did to the section of the territory referred to.

By Mr. Ellis:

Q. Will you state what that was.

A. The principal territory covered by contract with Ziffrin, Incorporated, the principal cities that they served for us and have served for us were: Cincinnati, Louisville, Hamilton, Middletown, Dayton, Piqua, Sidney, Greenville, Richmond, Oxford College, Connersville, Greenfield, Indiana; Anderson, Indiana; Muncie, Indianapolis, and at various times numerous small intermediate towns.

Q. Is that a general description of the territory where you used Ziffrin, Incorporated under contract in interstate Commerce upon July 1, 1935?

A. Yes.

Q. When did you first start using the services of that company, approximately?

A. Approximately in 1933.

Q. And have you continued to use the service down to the present time?

A. Yes, sir, there is an exception. After August, 1937, the territory to which we used them as contract carrier, Ziffrin, Incorporated, the territory was limited because of limitations that we were informed had been placed against them.

Q. That is, this situation that has been explained by Mr. [fol. 500] Ziffrin, he limited his operations along about August, 1937, because the limitation of services that they had been offering you prior to that time?

A. That is right.

Q. You have a contract with Ziffrin, Incorporated?

A. Yes.

Q. On or about July 1, 1935, was your contract written or verbal?

Mr. LaTourette: I object to the leading form of the question. The witness has not said he had one on July 1st, 1935.

Mr. Ellis: I believe he did. He testified he used their service under contract, and that don't mean that he had a contract. I don't know what he means.

Mr. LaTourette: I am objecting.

Mr. Ellis: I had that in there.

Exam. Lawton: I believe he answered to that effect.

By Mr. Ellis:

Q. Did you get the question?

A. He did have a contract.

Q. I want to ask you whether your contract on July 1, 1935, was verbal or written?

A. If I may be allowed to state our case, it is a little dissimilar from the other witness. It might make the record clear and simplify the examination. During the years we make hundreds of thousands of shipment-. Two or three [fol. 501] times when no particular carrier can furnish sufficient equipment to take care of our requirements, our shipments are perishable and must move when ready. We have numerous contracts. We use that contract operator to the extent of his ability to serve us. When he hasn't equipment, we use other contracts who are qualified in the territory, and such other service as is available. So we use practically all forms of transportation.

By Exam. Lawton:

Q. Including the motor common carriers?

A. Including motor common carrier.

By Mr. Ellis:

Q. I appreciate that explanation, but I don't believe you included the answer that I would like to get into the record.

A. I forgot.

Q. Did you have a verbal contract on July 1, 1935?

A. I intended to cover that. During a period of about in 1933, we developed a trucking agreement, which was a contract between the trucker and our company, stating the terms of the agreement, but not including the rates. The

rates were by separate agreement and at that time were verbal.

Q. In other words, your contract with the applicant, if any, on July 1, 1935, was verbal, is that right?

A. No, not—in 1934, we had——

By Exam. Lawton:

Q. No, 1935.

A. 1935, we had a signed trucking agreement which was [fol. 502] the essential part of our contract except for the rate.

Q. You used that in connection with all of the different forms of local transportation?

A. That is right.

By Mr. Ellis:

Q. You had such an agreement with Ziffrin, Incorporated?

A. We did.

Q. And supplemented that by a verbal agreement?

A. That is right.

Q. When the Interstate Commerce Commission required the filing of a bilateral contract, did you enter into such a contract?

A. Yes, we did.

Q. With Ziffrin, Incorporated?

A. We did.

Mr. Ellis: Take the witness.

Cross-examination.

By Mr. LaTourette:

Q. You do not have with you today, reference to any specific shipments that moved over the routes of Ziffrin, Incorporated?

A. I do not.

Q. You can't tell us the dates of any of them, the consignees' rates?

A. No, I did not prepare myself to do that. I personally made the arrangements. I have positive personal knowledge that we had Ziffrin, Incorporated before and after [fol. 503] July 1, 1935. That is what I came to testify to.

Q. As I see, you are not able to give us today, any reference to specific shipments?

A. No.

Q. Or any date of that character?

A. No.

By Mr. Goodman:

Q. Mr. Gilbert, this contract you had in 1933, that did not include rates?

A. (No response.)

Q. Wasn't that the same type of contract you had with these other carriers, whether they were common carriers or contract carriers?

A. That is right. It was pretty hard to tell each of those dates.

Q. You did not distinguish between Ziffrin as a contract carrier, and Ziffrin Truck Lines, a common carrier?

A. We most certainly did. We had a separate form signed by each.

Q. Was this separate form you had signed by Ziffrin, Inc.?

A. I just answered that question.

Q. Sir?

A. I answered it, that question. We had a separate agreement signed with each. This agreement included an insurance clause because it was under MC 10. That was the purpose of the contract was to be the basis for our [fol. 504] insurance with the insurance company.

Q. Yes. That you did with common carriers also, isn't that true?

A. I said, with all of them.

Q. With all of them?

A. Yes.

Exam. Lawton: He said with all.

By Mr. Goodman:

Q. When did you enter into a formal agreement with Ziffrin, Incorporated? That is coming back, coming before the time, after the Motor Carrier Act?

A. July 1st, 1937, was when the Commission required the filing of bilateral contracts.

Q. In that contract that you entered into in 1937, you got a lower rate, did you not, from Ziffrin, Incorporated, than you did from common carriers?

Mr. Ellis: You are asking about contracts on file with the Interstate Commerce Commission?

Mr. Goodman: Let me put it this way:

By Mr. Goodman:

Q. Mr. Gilbert, after you went into the contract with Ziffrin, Incorporated, the contract carrier, you got a lower rate under that contract than you had with Ziffrin before that time?

Mr. Ellis: I am going to object to that question.

By Mr. Goodman:

Q. Isn't that true?

Mr. Ellis: I am going to object again. Those contracts [fol. 505] are confidential property of the Interstate Commerce Commission, and cannot be disclosed, or made subject of inquiry.

Mr. Goodman: I did not ask the amount.

Exam. Lawton: He did not ask for any detail. He may answer.

The Witness: The rates were exactly the same, I might add, were the same by common carriers. I might qualify that. Possibly there are a few exceptions to a number of towns. Generally, our rates were on the same basis.

By Mr. Goodman:

Q. Let us take Muncie, Indiana, and Anderson and Indianapolis. There were lower rates in those three towns, were there not, Mr. Gilbert?

A. The rates to those three towns in July, 1938, were lower by common carrier and our shipments moved that way.

Q. They were lower by common carrier?

A. Yes, and still are.

Q. Did you move them by Ziffrin Truck Lines, the common carrier then?

A. Part of the time if they had the equipment.

Q. Part of the time you used them, via the Ziffrin Truck Lines, the common carrier? And part of the time you used Ziffrin, Incorporated, the contract carrier?

A. They moved via common carrier after the rate by common carrier was lower than the contract.

[fol. 506] Q. After the common carrier rate was lower?

A. Yes. It is simply a matter of economy.

Mr. Goodman: I readily appreciate it.

By Exam. Lawton:

Q. What period was that in which they moved by common carrier into those towns, approximately?

A. At the present time, and I believe about July, 1937.

Q. From that time on?

A. Yes, sir, excepting in those t*ow* towns.

Mr. Goodman: That is all.

By Exam. Lawton:

Q. One more question. Would that be by any common carrier, or by the common carrier known as Ziffrin Truck Lines?

A. The rate, I believe, was established by other common carriers, and Ziffrin became a party to that. Ziffrin Truck Lines became a party to that.

Q. You do not have with you a copy of this agreement that you entered into with the applicant and other carriers back in 1935, that you mentioned in your testimony?

A. I don't have. There are many, many of them on file with the Commission because that same form was copied in our schedule. We made a form to include the contract schedule of minimum rates all in one form.

Q. It ran for no definite period?

A. Yes, sir. It ran, that was the bilateral contract that guaranteed a fixed amount of tonnage per year, and con-

[fol. 507] tinues thereafter unless canceled on thirty days' notice, by either party.

Q. But it could be canceled on thirty days by either party?

Yes.

Q. It was the general form. You used it in connection with other carriers whose service you employed?

A. Yes, sir. Well, when you speak about a bilateral contract, in July, 1937——

Q. No, I am speaking of this form of agreement back in 1935.

A. We used that in connection with all carriers, either common or contract, with whom we did business, with the exception, with one exception of Keeshin Motor who had a bond up for the protection of their customers, and up until the time of the Commission's ruling on MC 10 that we discontinued that with the common carriers.

Q. Under that general contract, it ran for no specific time, did it?

A. Yes, from year to year, and canceled at that time, that form was to be canceled on 15 days' notice.

Q. And was used, as you stated, by all carriers with whom you did business, except the one carrier, Keeshin?

A. That is right.

Exam. Lawton: Any further questions?

(No response.)

Mr. Ellis: You may step down.

Exam. Lawton: You may be excused.

[fol. 508] (Witness excused.)

Mr. Ellis: Mr. Perry, please.

P. E. Perry, was sworn and testified as follows:

By Exam. Lawton:

Q. Give your name to the reporter.

A. P. E. Perry, Chicago, Illinois. I am general traffic manager of Kraft Phenix Cheese Company.

Direct examination.

By Mr. Ellis:

Q. What is the business of the Kraft Phenix Cheese Company?

A. Making cheese, and side cheese, also salad dressing—by products, cheese and various other commodities.

Q. You manufacture and sell that type of commodity?

A. Yes, sir.

Q. I want to direct your attention to the territory in the United States, including that in the state of Kentucky within a radius of 150 miles from the city of Louisville, all of the state of Indiana, all of the state of Ohio, all of the state of Illinois, St. Louis, Missouri, Milwaukee, Wisconsin, and Pittsburgh and Schenley, Pennsylvania. Do you have that territory in mind?

A. Yes, sir.

Q. Now, I want to call your attention to the applicant in this case, Ziffrin, Incorporated. Are you familiar with that company?

A. Yes, sir.

[fol. 509] Q. I will ask you whether or not on July 1, 1935, before that time, and since, has the Kraft Phenix Cheese Company used the services of Ziffrin, Incorporated, under contract for the transportation of their product in the territory that has previously been described in interstate commerce via motor vehicle?

Mr. LaTourette: The same objection, Mr. Examiner, as to the previous testimony of this character.

Exam. Lawton: Objection noted. Exception may be noted.

The Witness: With certain exceptions of the business between Illinois, Kentucky, St. Louis, Missouri, Ohio, and Indianapolis, Indiana. I don't believe we got into Pennsylvania.

By Mr. Ellis:

Q. Was the transportation with Ziffrin, Incorporated, furnished to you on July 1, 1935, and since that time, in this territory to a few principal points or was it from any principal towns and destinations in this territory you have described?

A. It was mainly between certain points, but, of course, such as between Chicago, Louisville, Indianapolis, St. Louis and points of that kind. Of course, there probably were intermediate points that did not especially cover the whole terrritory.

Q. You are using the service now?

A. We have contracts, yes, sir.

[fol. 510] Q. What sort of a contract did you have on July 1, 1935, with applicant, was it verbal or written?

A. An oral contract.

Q. An oral contract at that time?

A. Yes.

Q. When the Interstate Commerce Commission required this contract, did you enter into a written bilateral contract with the applicant, Ziffrin, Incorporated?

A. Yes, sir.

Mr. Ellis: Take the witness.

Exam. Lawton: Any cross-examination?

Cross-examination.

By Mr. LaTourette:

Q. Are you able to give me, now, Mr. Perry reference to specific shipments by dates and weights and other means of identifying those shipments which you had, or allege were transported by Ziffrin, Incorporated?

A. No.

Mr. LaTourette: That is all.

Exam. Lawton: Any questions?

By Mr. Goodman:

Q. Mr. Perry, did you use the services of Ziffrin Truck Lines, Incorporated, the common carrier company?

A. I beg your pardon. I did not get that.

Q. Did you ever use the services of Ziffrin Truck Line, Incorporated, the common carrier company?

A. I am pretty sure we did. We used practically all com-[fol. 511] mon carriers.

Q. You used those as well as you did Ziffrin, Incorporated?

A. Yes.

Q. Is that true?

A. Yes.

Q. In your agreement, there was a less, *there was a less* expensive movement of freight. In other words, the charges were less via the Ziffrin, Incorporated, than it was by the Ziffrin Truck Lines, Incorporated, the common carrier?

A. I would not say that. Mostly we used Ziffrin Truck Lines on less-than-truckload shipments, and the Ziffrin, Incorporated on truckloads.

Q. You know the territory they serve over is the same general territory served by the common carrier?

A. Not specifically, no. I don't know what routes that the Ziffrin, Incorporated went over.

Q. I mean, to the destination points I am particularly interested in.

A. I don't recall.

Q. In other words, the l. t. l. freight would move via the Ziffrin Truck Lines, Incorporated, and the truckload freight would move via the contract carrier company?

A. I couldn't say for sure on that. I don't recall offhand.

Q. Isn't it a fact that your company moved a great deal of merchandise by truckload lots over the Ziffrin Truck [fol. 512] Lines, Incorporated, the common carrier company as well as it did Ziffrin, Incorporated, the contract carrier company?

A. I couldn't say.

Q. You don't know?

A. No, I don't believe that they did. To my knowledge, they did not.

Exam. Lawton: While counsel are conferring, I might ask one or two questions:

By Exam. Lawton:

Q. Do I understand that you made arrangements on behalf of your company for motor truck transportation in 1935?

A. No, sir, I didn't.

Q. You did not?

A. No, sir. I was with the company and I had full knowledge of it being made.

Q. What was your connection at that time, about July 1, 1935?

A. July 1, 1935? I audited the freight bills, and also took care of general routing but I do not make any contracts.

Q. You had no discussions with the representatives of the carriers?

A. No, sir, I didn't.

Q. You have no personal knowledge then of the contracts that were entered into with the truckers, including this applicant, verbally or otherwise, did you?

A. No separate records that we have. I talked it over [fol. 513] with W. H. Ott, our general traffic manager, before I left Chicago.

Q. Who is the person of your company who made the personal contact with the carriers, made the arrangements with them?

A. Mr. W. H. Ott, general traffic manager. He couldn't be here. He is in New York today.

Q. Your knowledge is simply based on either hearsay, or what you have seen from the records in the office?

A. The records in the office, yes, sir.

Exam. Lawton: Any questions?

(No response.)

Exam. Lawton: You are excused.

(Witness excused.)

Mr. Ellis: Mr. Johnston, please.

R. C. JOHNSTON, was sworn and testified as follows:

Direct examination.

By Mr. Ellis:

Q. State your name to the Commission.

A. R. C. Johnston.

Q. Where do you live?

A. 145 Berkley Road, Indianapolis.

Q. If you are connected with any manufacturing Company, state what it is, and your official connection with the company.

A. I am treasurer of the Beveridge Paper Company.

By Mr. LaTourette:

Q. What is that?

[fol. 514] A. Beveridge.

By Mr. Ellis:

Q. Where is the place of business of the Beveridge Company located?

A. 717 West Washington Street, Indianapolis.

Q. What does that company make, or manufacture?

A. We manufacture waste paperboard.

Q. Directing your attention to that part of the United States, being the territory in the state of Kentucky within a radius of 150 miles of Louisville, the entire state of Indiana, Ohio, Illinois, St. Louis, Missouri, Milwaukee, Wis-

consin, Pittsburgh and Schenley, Pennsylvania, I will ask you if you have that territory in mind?

A. I do.

Q. Are you familiar with the applicant in this case, Ziffrin, Incorporated?

A. I am.

Q. I will ask you whether or not on July 1, 1935, or before that time, and since the Beveridge Paper Company has used the services of Ziffrin, Incorporated under contract for the transportation of your products in interstate commerce by motor vehicle in the territory you have just identified?

Mr. LaTourette: The same objection as previously made.

Exam. Lawton: It will be received subject to the objection; you may answer.

The Witness: We did.

[fol. 515] By Mr. Ellis:

Q. On July 1, 1935, was your contract with Ziffrin, Incorporated, verbal or written?

A. We had a verbal understanding only.

Q. When the Interstate Commerce Commission required the filing of written contracts of a bilateral nature, did you enter into such an arrangement with the applicant, Ziffrin, Incorporated?

A. Yes, we did.

Q. Have the movements which you have described in connection with your company on, before, and since July 1, 1935, been out of Indianapolis into this territory, or from the territory into Indianapolis?

A. Out of Indianapolis into the territory, points into the territory.

Q. Are there occasions when there is rejected, or a defective load of merchandise, however, which the applicant, Ziffrin, Incorporated, brings back to Indianapolis?

A. Occasionally, very seldom back.

Mr. Ellis: Take the witness.

Cross-examination.

By Mr. LaTourette:

Q. Mr. Johnston, you are not in a position to give me reference to specific shipments from the standpoint of date,

weight, consignee, and receipts of the shipments you have testified to?

A. Only to a few consignees.

[fol. 516] Q. Are you able to describe and specify shipments by weight, charges and dates?

A. Into what period?

Q. During the period you have testified?

A. I can't remember those items.

Mr. LaTourette: That is all.

By Mr. Goodman:

Q. Mr. Johnston, during this period of time that you used the services of the Ziffrin Truck Lines, Incorporated, the common carrier company, as well as you did Ziffrin, Incorporated, the contract carrier company?

A. Not to my knowledge we didn't, no.

Q. And you have never used the Ziffrin Truck Lines, Incorporated prior to July 1, 1935?

A. Not that I know of, we did not, no.

Q. You would not say you didn't?

A. No, I would not say we didn't, but I don't think that we did.

Mr. Goodman: That is all.

By Exam. Lawton:

Q. Do I understand that you made the transportation arrangements for your company in July, 1935? Did that come under your particular work?

A. Well, now, not particularly in that month, I had previously made that back there in 1933, or late part of 1932. I can't remember which, but it was away back there. We went right along. I don't know that any additional ar- [fol. 517] rangement was made in July, 1935.

Q. What position did you have with the company in 1935?

A. I was treasurer of the company.

Q. You did not make the arrangements with the motor carriers of transportation?

A. Yes.

Q. You did?

A. I made that myself.

Q. You made that yourself in 1935?

A. Yes.

Q. Now, you mentioned that the applicant hauled for you under a verbal contract, is that right?

A. Yes.

Q. What official or member of the applicant company did you deal with?

A. Mr. Ziffrin, personally.

Q. Mr. Sam Ziffrin?

A. Mr. Sam Ziffrin.

Q. Now, would these agreements run for any specific period, these oral agreements?

A. No. I don't know that we had any definite termination to them.

Q. Well, how long did they run, generally speaking? One week, a month?

A. Well, they run as long as a year, or over a year.

[fol. 518] Q. Well, were any of them for shorter periods?

A. No, because Ziffrin, Incorporated, only served our company in certain large centers. We don't do business in small towns. We distribute through the larger paper jobbers in the larger cities, such as Louisville, St. Louis, Chicago, Milwaukee, Cincinnati, and so forth.

Q. Did you ever make an arrangement just say, for one load, or anything like that, when some emergency would come up?

A. I can't recall that we ever did for one particular load, no.

Q. Well, the manner of making arrangements with the applicant were they different from the arrangements you made with other carriers, other motor carriers?

A. Not essentially different in those days that you refer to back in '35, '34 and '35.

Q. In those days you dealt with all of the truckers, we will say, practically about the same, is that right?

A. Yes, so far as agreements were concerned.

Exam. Lawton: Any further questions?

Mr. Ellis: You may step down.

Exam. Lawton: You are excused.

(Witness excused.)

H. E. Rumrill, was sworn and testified as follows:

Direct examination.

[fol. 519] By Mr. Ellis:

Q. What is your name?
A. H. E. Rumrill.
Q. State it so that they can hear it back there.
A. H. E. Rumrill.
Q. Where do you live, Mr. Rumrill?
A. Indianapolis.
Q. If you are connected with any business or manufacturing company, will you please state what that company is, and your business with it.
A. Standard Nut Margarine Company, Indianapolis, Indiana.
Q. Where is the place of business of the company of which you testified you were traffic manager?
A. 1102 Roosevelt Road, Indianapolis.
Q. What do you make, or manufacture?
A. Oleomargarine.
Q. Calling your attention to that part of the United States included in the territory of Kentucky, within a radius of 150 miles of Louisville, all of the state of Indiana, all of the state of Illinois, all of the state of Ohio, St. Louis, Missouri; Milwaukee, Wisconsin; and Pennsylvania in and about Pittsburgh and Schenley, I will ask you if you have that territory in mind?
A. I do with the exception of Milwaukee.
Q. You have that in mind?
A. I have that in mind.
[fol. 520] Q. Now, I will ask you if on July 1, 1935, before that time and since you have used the service of the applicant, Ziffrin, Incorporated, under contract for transportation of your product in interstate commerce by motor vehicle in the territory that you have just identified?

Mr. LaTourette: The same objection, on the same grounds.

Exam. Lawton: He may answer.

The Witness: I have.

By Mr. Ellis:

Q. Now, do I understand that you want the record to show that you have, except to Milwaukee, Wisconsin, is that right?

A. All of the state of Wisconsin.

Q. Sir?

A. We do not ship anything, never have shipped anything into the state of Wisconsin.

Q. Into the state of Wisconsin. Your answer is applicable to the territory excepting Wisconsin?

A. That is right.

Q. How long have you been with this company as traffic manager?

A. October 16th, 1922.

Q. You were traffic manager long prior to July 1, 1935, is that right?

A. Yes, sir.

Q. How long have you used the service of the applicant, [fol. 521] Ziffrin, Incorporated, in this territory?

A. In January, 1934, if I remember right.

Q. In giving your testimony as to the use of this applicant's service on July 1, 1935, before and since, are you basing your statement solely upon your recollection, or did you make some investigation of your records?

A. I made some investigations of my records.

Q. Just state what that was, will you, please?

A. Since noon, after hearing the previous testimony of the questions asked the other shippers, I went back to the office and dug up a few freight bills of Ziffrin, Incorporated.

Q. Were they dated on or before July 1, 1935?

A. Before.

Q. And you actually examined them this noon?

A. Yes.

Q. In your files?

A. Yes, sir.

Q. Was your contract with Ziffrin, Incorporated, on or before July 1, 1935, a verbal or written one?

A. Verbal.

Q. When the Interstate Commerce Commission required bilateral written contracts to be filed by contract carriers, did you enter into such an arrangement with the applicant, Ziffrin, Incorporated?

A. We did, yes, sir.

[fol. 522] Mr. Ellis: Take the witness.

Exam. Lawton: Cross-examine.

Cross-examination.

By Mr. LaTourette:

Q. I understand you made some investigation of your record since noon, Mr. Rumrill?

A. Yes, sir.

Q. That investigation dealt with shipments prior to July 1, 1935?

A. Yes, sir.

Q. Did you make any investigation after July 1, 1935?

A. No, I didn't. I didn't need to.

Q. I see. Have you specific reference to the shipments prior to July 1, 1935, from the standpoint of date, consignee, destination, consisting of the shipment, weight and charges?

A. I have a few. I did not bring the rate, nor the charges with me, because I did not think they were necessary.

Q. Did you bring the weight?

A. Yes, sir.

Q. Give me the reference to the shipment prior to July 1, 1935?

A. With Ziffrin, Incorporated, pro number 5835, dated January 2nd, 1934.

Q. Pro number 5835, Ziffrin, Incorporated?

A. Yes.

Q. January 2nd, 1934.

[fol. 523] A. Consigned to the White Villa Grocery Company, Cincinnati, Ohio.

Q. Cincinnati, Ohio.

A. Yes, sir.

Q. What did that shipment consist of?

A. Oleo, 500 cases of oleomargarine, 10,000 pounds.

Q. 10,000 pounds. All right. What is the next one?

A. Pro number 6155, dated January 8th, 1934, to the Arthur Backer Company, Cincinnati.

Q. Arthur Baker Company, Cincinnati, Ohio?

A. Yes. 500 cases, 10,000 pounds.

Q. 500 cases, 10,000 pounds?

A. Yes.

Q. Of oleo?

A. Yes. You want some more?

Q. Yes.
A. Pro 8542, February 28th, 1934.
Q. All right.
A. To Larkin Company, Peoria, Illinois, 500 cases, 10,000 pounds.
Q. All right.
A. Pro number 9028.
Q. All right.
A. March 6th, 1934.
Q. All right.
A. The same consignee and destination.
[fol. 524] Q. Peoria, Illinois?
A. Yes.
Q. Yes, all right.
A. A thousand cases.
Q. All right.
A. 22,000 pounds.
Q. All right. Is that all you have?
A. That is all I brought with me. I was just interested in those before 1935.
Q. And those are all shipments to which you can give me specific information?
A. Yes.
Q. Did you determine to whom freight charges were paid on those shipments?
A. Yes, to Ziffrin, Incorporated.

By Exam. Lawton:

Q. Ziffrin what?
A. Ziffrin, Incorporated.

By Mr. LaTourette:

Q. Do you know of your own knowledge who transported the shipments?
A. In what way do you mean? Did they send out their own trucks?
Q. Yes.
A. With the assessment on Ziffrin, Incorporated.
Q. Whether they were transported on a truck bearing some other name than Ziffrin Trucker?
[fol. 525] A. I can't answer that.
Q. You couldn't say?
A. No.

Q. You couldn't say whether they were transported on a truck bearing the name of Ziffrin Truck Lines, Incorporated, or Ziffrin, Incorporated?

A. No, I would not say that.

Q. Did you examine the bills of lading covering these shipments?

A. Yes, sir.

Q. Is that where you took the information that you have just given me?

A. I took the information—our system is to make the bill of lading on the original bill of lading, and the paid freight receipt I clipped together as a permanent file, permanent paid bill file.

Q. Did you examine the heading on these particular bills?

A. Yes, sir.

Q. What is the heading on them?

A. Ziffrin, Incorporated.

Q. You don't have any specific information as to shipments after July 1st, 1935?

A. I did not take the time to look it up.

Mr. LaTourette: That is all.

Exam. Lawton: Any questions, Mr. Goodman?

[fol. 526] Mr. Goodman: Yes.

By Mr. Goodman:

Q. Mr. Rumrill, you also shipped by Ziffrin Truck Lines, Incorporated, the common carrier company, did you not?

A. Yes, sir.

Q. And that ole-margarine went from Indianapolis to Chicago via both companies, did it not?

A. From Indianapolis to Chicago.

Q. Yes.

A. We did not ship any to Chicago right at that time.

Q. You did not ship anything to Chicago at that time?

A. I did not give you any at that time to Chicago.

Q. I see.

A. It was a little after that when we got into Chicago territory.

Q. I am not talking about the shipments that you just referred to, did you have any movements to Chicago around July 1, 1935, at all?

A. I did not check up any of those, Mr. Goodman.

Q. I beg your pardon?

A. I did not find any records on those. I didn't think I had time at noon. But our contract at that time, and previous to that time, covered Chicago, and points in Chicago and Illinois.

Q. Prior to the time that you entered into an agreement [fol. 527] with the contract carrier company, all of your movements went via Ziffrin Truck Line, the common carrier Company, is that true, Mr. Rumrill?

A. No. We had contracts before that time with other contract companies.

Q. With other contract companies?

A. Yes.

Q. You also had common carriers too?

A. Oh, yes.

Q. To the same destination points?

A. Yes.

Q. When you entered into the contract with Ziffrin, Incorporated, the contract carrier company, you got a reduction in the rate on oleomargarine to these points, did you not?

A. I might have got a little reduction in rate on the truckload.

Q. It was a considerable reduction?

A. No.

Q. Probably around 12 to 14 cents a hundred?

A. I would not say that, no. We got much better service.

Q. I am not talking——

Mr. Ellis: Let him answer the question. Go ahead.

By Mr. Goodman:

Q. You did have a reduction in rates?

A. As I recall, yes, all of the contracts are a little reduced.

By Exam. Lawton:

Q. Do I understand that you made the arrangement with [fol. 528] the applicant for transportation during 1935?

A. Myself?

Q. You, personally?

A. Personally.

Q. Were those arrangements any different than the arrangements you made with other carriers, other motor carriers?

A. Yes. We didn't make any arrangements with other motor carriers at all. We just shipped according to their tariff rules.

Q. You stated you had a verbal agreement, I believe.

A. Yes.

Q. Did that agreement cover anything other than the charges to be paid?

A. Yes, it covered everything, all the kind of equipment. We were supposed to get the right kind of equipment, when we wanted it.

Q. You continued giving the applicant traffic under the verbal arrangement until the Commission required written contracts?

A. Yes, sir.

Exam. Lawton: Are there any other questions?

(No response.)

Exam. Lawton: If there are no other questions, you may be excused.

Mr. Ellis: You may step down.

(Witness excused.)

[fol. 529] Mr. Ellis: This gentleman is in the city; if anybody should happen to want him, they can call him back. We have another witness, Mr. Angell, who is also from Indianapolis who has been here and who has been called to his office.

Exam. Lawton: We will take a few minutes recess.

Mr. Ellis: Just before we do, Mr. Examiner, we had hurriedly typed in one of the rooms of the Commission in a little better form, this exhibit, which is identified by the witness Gusky as exhibit 3.

Exam. Lawton: Off the record.

(Discussion outside of the record.)

Mr. Ellis: Go ahead, Mr. Loughry.

Mr. Louhry: We have one more witness, Mr. Examiner. Outside of this one witness, we have completed our case, except for the statement I want to make. Should he re-

appear, we would like to have permission to put him back on in behalf of the first part of this case. We expect him back but he has not showed up yet.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

SAM ZIFFRIN, recalled, previously sworn and further testified as follows:

Examination.

By Exam. Lawton:

Q. Mr. Ziffrin, I believe you stated, when you organized [fol. 530] the contract carrier company, that is already a matter of record, is it not?

Mr. Ellis: Yes, sir, I believe it is.

By Exam. Lawton:

Q. At that time, were you connected with the common carrier Trucking Line?

A. I was.

Q. I do not know whether you have stated, but I would like to have it clear how you set up the contract company to go into that part of the trucking operation?

A. The Ziffrin Truck Lines was in existence prior to December, 1933, of course, operated under the state regulations which were then in effect as a common carrier. Prior to the time that the beer and malt beverages, and alcoholic liquors, and prior to the time of the repeal, knowing that repeal was coming, the state legislature here, passed an alcoholic liquor control law.

By Mr. LaTourette:

Q. Could I interrupt you there just a minute, Mr. Ziffrin: did I understand you to say that Ziffrin Truck Lines, Incorporated, was incorporated prior to the incorporation of Ziffrin, Incorporated?

A. I didn't say it was incorporated. I said it was in existence. Ziffrin Truck Lines was in existence, and never

died, prior to 1933, as an individual; but the same people, the same individuals that was in business before that time, or the chief stockholder in the Ziffrin Truck Lines is there [fol. 531] to this day, there has been no change in the personnel except the company was incorporated. In other words, Ziffrin Truck Lines, Inc. became the predecessor of Ziffrin Truck Lines, doing business as an individual.

By Exam. Lawton:

Q. Then, do I understand you set up and incorporated Ziffrin, Incorporated, mainly with the idea of handling liquor and alcoholic beverages after repeal became effective?

A. That is right, for the reason that it was the suggestion of the people that we dealt with that we go into the state of Indiana, and obtain certain small routes that we couldn't possibly have gotten under the Ziffrin Truck Lines, and there was some strange capital put in. A new corporation was formed, and the state of Indiana then gave us a permit as a contract carrier over their road and highway in the state of Indiana, and the state of Ohio did likewise. That was in effect at the time of the incorporation of Ziffrin, Incorporated, and have the same stockholders today and have secured and received dividends. They have no connection, other than myself, with Ziffrin Truck Lines.

Q. I made a ruling this morning, which part I am going to reverse, because I do not want to foreclose the applicant of any opportunity, but there has been a statement submitted by a witness with reference to cities and towns, which he claimed the applicant had served. That was identified as exhibit 3. Now, I am going to show you that and ask you [fol. 532] if those are the towns to which you claim the right to transport alcoholic beverages and alcohol as a contract carrier?

A. That is correct. In addition to these, the portion of Kentucky within a radius of 150 miles, those few points in Wisconsin and Schenley, and Pittsburgh, Pennsylvania, which we did have before, but by agreement with Mr. Snodgrass, we discontinued. These are very active today.

Q. Then, I understand that your claims with respect to the other commodities as a contract carrier have been stated

by the preceding witnesses, does their testimony claim as a contract carrier——

A. Plus one more witness.

Q. Well, if the Commission understands that your claim as a contract carrier is limited to alcoholic beverages, distillery supplies, canned and preserved fruit products, paper and paper products, packing house products, does that embrace the list? If it does not, will you elaborate on it, which I am asking you now?

A. We are going to claim additional commodities. The commodities that we are going to claim are the commodities that we did handle under contract prior to August, 1937, and which we discontinued, chief amongst which is steel, plus that additional territory.

Q. Is steel the only additional commodity?

A. I believe that is the only one.

Q. Steel and steel articles?

[fol. 533] A. That is right.

Mr. Ellis: Mr. Ziffrin has a list of these commodities that we prepared, Mr. Examiner. I would like to have him find it so that he can be sure he has answered correctly.

The Witness: I will tell you, the commodities we are claiming are canned, preserved and prepared foods, shoe polishes and dressings, packing house products and fresh meats, alcoholic liquors, distillery supplies, including bottles, milk, condensed and evaporated, dairy products, including oleomargarine, cheese, paper products, paper articles, steel and iron articles, and batteries. That is the complete list of commodities that we are claiming.

By Exam. Lawton:

Q. One or two other questions. Can you state approximately the number of contract shippers that you claimed to have served on July 1, 1935?

A. Approximately 25.

Q. Can you state the number, the exact number that you claim to serve at the present time?

A. About 20.

By Mr. Goodman:

Q. Did you say 25 or 45?

A. 25.

By Exam. Lawton:

Q. The list of commodities which I took from the so-called compliance order, those already in the docket in this case, that represents your claims as of the grandfather date, July 1, 1935?

[fol. 534] A. No.

Q. You still claim additional commodities as of that date?

A. That is right.

Q. Now, I think that the Commission ought to have, to complete this record, an abstract of the operations of the applicant from the points claimed as origins and representative destinations in the states claimed, respecting all of the commodities enumerated by the witness, I will say for at least June, 1935, at least one month in 1937, and the most recent date possible supported by the shipping documents.

Mr. Loughry: May I make a statement in that connection?

Exam. Lawton: Make it on the record.

Mr. Loughry: Yes, I would like to have it made on the record. For the information of the Commission, an abstract of the commodities, as the Examiner has just suggested, has not been made in this case for the particular reason that the large portion of the movement has been alcoholic liquors. Three companies and subsidiaries with which this company does business have refused to give their consent to this applicant to disclose any of its shipping records, relying on Section 222-E of the Motor Carrier Act. Since the hearing has started they have agreed to this proposition: that the applicant furnish an abstract showing the shipments of commodities, point of origin and the point of destination and the commodity, backing up this [fol. 535] exhibit by the documentary evidence of freight bills, receipts, or whatever form of evidence does prove it. If, and providing we can turn this list and this documentary evidence over to one representative of the protestants to go over with either Mr. Ziffrin, or Mr. Ellis or myself, with the specific understanding that the information disclosed in this documentary evidence is not to be given to anyone; also that we are perfectly willing to submit all of the documentary evidence to the Commission itself; but the attitude of the distillers in this particular case, and they have assumed

that we are bound by Section 222-E, we had no choice in the matter; but since this hearing has started, they have agreed to that, and if that is agreeable to the Examiner, that we will do.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record. You may proceed with the hearing, as far as we can. Just one other question occurred to me.

By Exam. Lawton:

Q. I presume that you handled principally the business contracts for the contract carrier, Ziffrin, Incorporated?

A. Yes.

Q. When you started?

A. Yes.

Q. Wasn't your agreement is practically all instances [fol. 536] with the shipper—weren't they all the same in practically all instances?

A. No. We have contracts in writing back to 1934, that are on file in this building this minute. If you will just give me five minutes, I am sure the Commission would be glad to let me get the file out and read the contents we have to support our request for a contract, prior to the Federal requirement with the state, that they require a contract.

Q. That may be helpful to this proceeding.

A. I am sure they will allow me to get it.

Exam. Lawton: Mr. Ellis, do you have any questions?

Mr. Ellis: No, you may step down for a moment.

Exam. Lawton: Any cross-examination?

Mr. LaTourette: Has the Examiner completed his interrogation with respect to the history of the organization, and so forth?

Exam. Lawton: Yes.

Mr. LaTourette: I don't know that this is pertinent right at this time. If it isn't, why——

Mr. Ellis: Let me suggest to counsel that you defer it, because if we are going to go into that on direct examination, I will give you the articles of incorporation, and all that. We have all of that information here. I think it will help you out, if that is agreeable to you.

Mr. LaTourette: That is all right.
Mr. Ellis: Step up, Mr. Angell, and take the stand.

(Witness excused.)

[fol. 537] B. M. ANGELL, was sworn and testified as follows:

Direct examination.

By Mr. Ellis:

Q. Your name is B. M. Angell?
A. It is.
Q. Where do you live, Mr. Angell?
A. Indianapolis, Indiana.
Q. Are you connected with any manufacturing or distributing company? If so, state what it is, and your official capacity, please.
A. I am general traffic manager of Stokely Brothers & Company, and Van Camps, Incorporated, who are packers of canned fruits and vegetables at points throughout the United States, including eleven plants in Indiana.
Q. Those are affiliated and allied companies, Stokely and Van Camps?
A. Stokely Brothers Company is the parent company of Van Camps, Incorporated.
Q. You have places of business generally throughout the entire United States of America, is that correct?
A. That is correct.
Q. Your products are sold, distributed and advertised nationally, is that correct?
A. They are.
Q. I want to direct your attention to that portion of the [fol. 538] United States including the territory approximately 150 miles in radius of Louisville, Kentucky, in the state of Kentucky, all of the state of Indiana, all of the state of Illinois and Ohio, St. Louis, Missouri, Milwaukee, Wisconsin and Pennsylvania in and about Schenley and Pittsburgh, Pennsylvania. Do you have that territory in mind, I have just described?
A. Yes. We distribute generally to that territory, particularly from our Indiana plant.

Q. Are you acquainted with the applicant in this case, Ziffrin, Incorporated?

A. I am, sir.

Q. I will ask you whether or not, on July 1, 1935, prior to that time, and since that time, your companies have used the service of Ziffrin, Incorporated under contract for the transport-ion of your commodities in interstate commerce by motor vehicle in the territory that you have just identified?

Mr. LaTourette: The same objection on the same ground.

Exam. Lawton: He may answer.

The Witness: We did use as Ziffrin Service—we did use Ziffrin Service prior to July 1, 1935, and do yet.

By Mr. Ellis:

Q. What were the points of origin generally of your products, Mr. Angell?

A. That which we ship by Ziffrin, Incorporated?

Q. Yes.

A. Jeffersonville, Indiana, Whiteland, Indiana, Green-[fol. 539] wood, Indianapolis, Martinsville, Anderson, Elwood, Tipton, Peru, and Wabash, all located in the state of Indiana.

Q. Mr. Angell, for the record and for the information of the Examiner, who may not be familiar with all of these small towns in Indiana, I will ask you whether or not those generally cover practically the entire state of Indiana?

A. They are generally speaking, they are scattered throughout the northern and southern, both eastern and practically western sections of the state. We have plants at all of those localities where we pack our canned vegetables.

Q. Now, referring to all of those points of origin, I will ask you whether the use you made of Ziffrin, Incorporated, under contract on July 1, 1935, before and since that time, was to a few isolated destinations in the territory that you have identified, or generally over that territory?

A. Generally because we distribute our products in all distributing points of primarily, say, five thousand population and more. Some may be even smaller, but where there is a distributor, wholesaler or otherwise, we make distribution of our products to them.

Q. Was the contract you had with the applicant, Ziffrin, Incorporated, on July 1, 1935, or as far as this interstate move is concerned, verbal or written, Mr. Angell?

A. Prior to July 1st, 1935, it was verbal.

Q. Do you now have the written bilateral contract with [fol. 540] the applicant, Ziffrin, Incorporated, that was required by the regulations of the Interstate Commerce Commission?

A. We do.

Exam. Lawton: You may cross-examine.

Cross-examination.

By Mr. LaTourette:

Q. Mr. Angell, are you in a position to give me in detail a point of origin, date, destination, consignee, consist shipped, weight, charges, or rate?

A. All were made by Ziffrin?

Q. Yes.

A. We shipped about eight million pounds a month, and it is impossible to remember them all.

Q. You couldn't give any specific reference to shipments that were hauled by contract carriers?

A. Surely, it was in the fall of 1936—no, it was in about April, 1936, unfortunately, so far as our part of those records, they were destroyed in the Louisville flood, but our Jeffersonville warehouse, where we kept them. I did, personally, though, work up those records and know of the particular shipments that we have by the various truck lines. As to what they say moved, or what they weighed, from and to where they went, I couldn't. I don't think it is humanly possible to remember.

Mr. LaTourette: That is all.

Exam. Lawton: Mr. Goodman.

[fol. 541] Mr. Goodman: Yes.

By Mr. Goodman:

Q. Prior to 1936, most of your movement was intrastate in Indiana, was it not?

A. No, sir, mostly interstate.

Q. Mostly interstate?

A. Yes, prior to and now.

Q. When did you enter into your written contract?
A. In July, 1936.

Mr. Goodman: That is all.

By Exam. Lawton:

Q. Did you personally make arrangements with Ziffrin, Incorporated?

A. Yes, I did.

Q. With what official of the company were they made, with Mr. Sam Ziffrin?

A. No. They were made with Ziffrin, Incorporated, Ziffrin, Inc.

Q. What representative of Ziffrin, Incorporated, came to you, to see you about hauling for your company?

A. Well, originally, the verbal contract was made with Mr. Sam Ziffrin, I think. That was in, I think, February or March, 1934.

Q. Would that run for any length of time?

A. Well, the verbal contract was commonly from year to year, subject to be terminated on 15 days' notice of either party. Our written contract was on the same basis from [fol. 542] year to year, to be terminated on 15 days' notice of either party, as I recall.

Q. You used other carriers at that time, didn't you, other motor carriers?

A. Yes, sir.

Q. Did you have any different arrangements with the other carriers?

A. We did not. The arrangements were, that we had with all of our truck lines, are identical, were then, and are at the present time.

Q. You do not recall how many motor carriers you were using in 1935, say, in July of 1935?

A. Yes, sir. I think I can tell you exactly, about 8 contract carriers, insofar as involving the territory that has here been described. We had some that went to the southern states. We had two.

Q. That was in July, 1935.

A. Yes, sir.

Q. Well, did you use any common carriers then?

A. Not a great many, some.

Q. Did you have any additional arrangement with the common carriers than you did with these eight carriers?

A. Prior to federal regulation, they were identical. They remained identical up until about August, 1937, when I made arrangements as to rates, rules and regulations gov-
[fol. 543] erning the transportation. We endeavored to see that they were identical; that there was not any departure, any difference between them.

Q. In other words, if the representative of one of them came to see you, you would agree in your office that he should haul for a certain period, and you would agree on the charge, is that it?

A. Yes, sir. That is, if we needed his facilities.

Exam. Lawton: I am through. Any further questions?

Mr. Ellis: You may step down.

Exam. Lawton: You may be excused.

(Witness excused.)

Mr. Ellis: Off the record, please.

(Discussion outside the record.)

Exam. Lawton: On the record.

L. R. Lasley, was sworn and testified as follows:

Direct examination.

By Mr. Ellis:

Q. What is your name, please?

A. L. R. Lasley.

Q. Will you spell your name for the reporter?

A. Yes, sir.

Q. State it for the benefit of these gentlemen over here.

A. L-a-s-l-e-y.

Q. Where do you live, please.

A. Marion County, Indianapolis.

[fol. 544] Q. What official connection do you have with the Public Service Commission of Indiana?

A. I have charge of all rates, contracts and tariffs for motor carriers in Indiana.

Q. Do the rules and regulations of your Commission require, and have they required for sometime, the filing of written contracts with your department?

A. They have.

Q. I will ask you whether or not at the request of the applicant in this case, Ziffrin, Incorporated, you have brought your file relative to that company, to this hearing room?

A. I have.

Q. Do you have it before you here?

A. I have.

Q. I will ask you whether or not Ziffrin, Incorporated, have filed written contracts with your department?

A. They have.

Q. I wish you would refer to that file and give us the dates and the names of the parties involved in some of those contracts, at least, Mr. Lasley?

A. I have a contract here between Ziffrin, and the Old Quaker Distillery that was filed with our commission on August 26th, 1935; and this contract was executed on May 27th, 1935. I have another contract between Ziffrin——

By Mr. LaTourette:

Q. When you say, Mr. Lasley, what is the other part [fol. 545] of the name?

A. Ziffrin, Incorporated, is this fellow. I have another contract here between Ziffrin, Incorporated, and the Indiana Condensed Milk Company, that was approved by our Commission March 14th, 1936. This contract was executed on January 28th, 1936. I have another contract between Ziffrin, Incorporated, and the Hoosier Panel Company, which is received in our department on January 16th, 1936. The contract was executed January 13, 1936.

By Mr. Ellis:

Q. Now, Mr. Lasley, I will stop you unless somebody else wants to ask you anything further. Is it permissible for the Examiner of the Interstate Commerce Commission to examine these papers?

A. As long as he don't take them for exhibits, or take them out of our records.

Mr. Ellis: Yes, sir.

By Exam. Lawton:

Q. May I ask you, Mr. Lasley, with respect to these contracts to which you have testified, it extends only to operations within the state of Indiana, is that true?

A. That is right, yes, sir.

Exam. Lawton: Were you through?
Mr. Ellis: Yes. I was through.
Exam. Lawton: You may cross-examine.

Cross-examination.

By Mr. LaTourette:

Q. Do the contracts in their terms simply make reference [fol. 546] to transportation between points in Indiana?
A. That is correct.
Q. Are any of those contracts—or do they have anything to do with interstate traffic only?
A. No. I think we have some contracts in here.
Q. I mean any of those that you just named?
A. No.

By Mr. Ellis:

Q. Just one other question, Mr. Lasley: you have other contracts in your file, do you not?
A. Yes, sir, I do.

Mr. Ellis: Unless there is any other examination, you may step down.
Exam. Lawton: Any other examination?

(No response.)

Exam. Lawton: If not, you may be excused.

(Witness excused.)

Mr. Ellis: This might be off the record, unless the examiner wants it.
Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record. I understand, then, that the applicant is through presenting the first part and the issue involved in this proceeding, that relating to the rights of the grandfather clause.
Mr. Ellis: That is correct, with the exception of Mr. [fol. 547] Angell, arrangement might be made for him to make a digest of documentary evidence.
Exam. Lawton: I hope today that you may reach some agreement as to the submission of the history of the operation in the form which I suggested, before the conclusion of

the hearing. In fact we simply must have that for the record as I see it. However, I won't make any suggestions about it now, you may go ahead with the case. This is exhibit No. 3. Off the record.

(Discussion has outside of the record.)

Exam. Lawton: We might take a few minutes recess.

(A short recess was taken.)

Mr. Ellis: Now, may it please the Examiner. Is it my understanding that we are now ready for the time being at least to turn our attention to the second matter advanced by the notice given to the Commission concerning this hearing. In that connection at this time, and in behalf of the applicant, Ziffrin, Incorporated, we desire to make a motion that the proceedings embodied in that part of the notice which we designated as the second part, which I will read in a moment, be dismissed. It is not my purpose at all to take the time of the Examiner, or parties to make an extended legal argument at this time. However, I do, for the record, and in order that the Examiner may be informed of our position, point out briefly what our position is, if [fol. 548] I may be permitted to do so.

Exam. Lawton: Make it as brief as possible.

Mr. Ellis: I will do so. I am now reading from the notice of the Commission, calling this hearing, and it is as follows: "Notice is hereby given that although application herein is for a certificate on form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the defendant Truck Lines, Incorporated, No. MC 2510, and if said applicant or defendant truck lines are found to be affiliated within the meaning of Section 5, paragraph 6 of No. 1, applicant must also establish that a permit may be held by applicant consistently with public interest with the policy declared in second 202 (a), Motor Carrier Act of 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act of 1935." Now, in the first instance, I desire to call to the attention of the Examiner, that this notice says that we have to establish these relationships if they are found to be within the meaning of a part, a certain part of No. 1, we have to do something else. I have read the Motor Carrier Act of 1935, which is Part 2 of the Interstate

Commerce Commission's Act, a good many times, and recently again, with a great deal of care. The only parts, or portions, or sections, or paragraphs of No. 1 which are applicable to motor carriers are made so by specific reference [fol. 549] in No. 2 to that part of No. 1 which applies. There is no such reference in No. 2, to section 5, paragraph 6 of part 1. Therefore, in the first instance we are referred back here to a section of law about railroads which Congress said, or failed to say was applicable to motor carriers. In the second instance, it is again significant, and I believe proves my point conclusively, that in amending the Motor Carrier Act this year, Congress wrote in an amendment, putting in verbatim the language that is in paragraph 6, paragraph 5, Subdivision 6, thus making it applicable to motor carriers. Now, if it was already applicable to motor carriers, as this notice would seem to indicate, we fail to understand why the Congress of the United States would this year pass an act and so state it was applicable to motor carriers. Now, then, when it is applicable to motor carriers under the amendment of this year, or if by any strange view or statutory construction, the old provisions of the Railroad Act could be construed to be applicable here and applicable to motor carriers, but not applicable here if it had to do with the proposed consolidations and mergers, the matter sought to be inquired into here was in existence at the time the Motor Carrier Act went into existence, and it is our position that the Constitution of the United States prohibits passing expo facto laws. Is that our position, Mr. Loughry, briefly?

Mr. Loughry: Correct.

[fol. 550] Exam. Lawton: How about Section 213, B-1, as it formerly read, couldn't that prohibit?

Mr. Loughry: That is the amendment, which you are referring to.

Exam. Lawton: Well, either the amendment, or the provision was read prior to the amendment.

Mr. Ellis: Neither one in our opinion. They relate entirely to a motor carrier, or motor carriers. Now, since the enactment of the Motor Carrier Act, they seek to establish some sort of a corporate relationship, consolidation or merger, and they don't go back again and let you go back and tie to something that was in existence prior to the Motor Carrier Act. The thing is to accomplish or to effect

these things, if there is no such proposal on the part of the applicant here, to accomplish anything.

Exam. Lawton: Well, if there is nothing from the protestants on that I will, of course, have to overrule your motion, and require you to proceed.

Mr. Ellis: I anticipated that, Mr. Examiner. I just made that for the record, to make our position. We expect to pursue legal argument on that later. We are prepared to proceed. Mr. Ziffrin, will you take the stand.

SAM ZIFFRIN, was sworn and testified as follows:

Direct examination.

[fol. 551] By Mr. Ellis:

Q. You are the same Sam Ziffrin who has testified here heretofore, in these proceedings?

A. I am.

Q. At this time I want to call your attention to the applicant in this case, Ziffrin, Incorporated.

A. Yes.

Q. And although a few of the questions may be a repetition, in order to get this entire picture of the corporate identity, I will ask them over again, if permitted. I wish you would state whether or not the applicant, Ziffrin, Incorporated, is a corporation?

A. It is.

Q. I will ask you whether or not it is organized and existing under and by virtue of the laws of the state of Indiana?

A. It is.

Q. I will ask you whether or not its principal place of business is the state of Indianapolis, Indiana?

A. It is.

Q. I will ask you whether or not its business is that of transporting proper by motor vehicle in interstate commerce under contract?

A. It is.

Q. Now, in some of your succeeding questions, Mr. Ziffrin, if it is necessary to make reference to any memorandum, if you find it necessary to — any memorandum, that [fol. 552] you have prepared for that purpose, you may

do so. I wish you would state for the record who the stockholders of Ziffrin, Incorporated, are?

A. Myself, Mr. S. O. Berman of Logansport, Indiana, and Mr. Lewis Berger, Arverne, New York, Rose Levi, 3145 North Illinois Street, *North Illinois Street*, Indianapolis.

Q. I wish you would state who composes the Board of Directors of the applicant, Ziffrin, Incorporated?

A. Myself, R. Levi, and S. O. Berman.

Q. I wish you would state for the record whether or not you hold any office or official position with the applicant, Ziffrin, Incorporated?

A. I am president and general manager.

Q. At my request, have you obtained from the secretary of state of the state of Indiana, a certified copy of the articles of incorporation of the applicant, Ziffrin, Incorporated?

A. I have.

Q. You have those articles here with you?

A. I have.

Mr. Ellis: Will you mark that?

(Applicant's exhibit 4 marked for identification.)

By Mr. Ellis:

Q. I will hand you a paper which, for the purposes of identification, the reporter has marked exhibit 4, and ask you to state what that is?

A. That is a certified copy of the Articles of Incorporation of Ziffrin, Incorporated.

[fol. 553] Mr. Ellis: Do you gentlemen wish to see this document?

Mr. LaTourette: No.

Mr. Ellis: May we offer this in evidence?

Exam. Lawton: If there is no objection, it may be received.

(Applicant's exhibit 4, witness Ziffrin, received in evidence.)

Exam. Lawton: By the way, I suppose, due to the expense of this, you do not have copies.

Mr. Ellis: That is right, I do not think it is necessary with those formal documents. If anybody wants any more,

we will be glad to get them. They cost us about three or four dollars.

Exam. Lawton: I take it, no one will require it.

Mr. Ellis: Just the formal articles of incorporation required in the state of Indiana.

By Mr. Ellis:

Q. Mr. Ziffrin, I now direct your attention to a company known as Ziffrin Truck Lines, Incorporated, and which is mentioned in the notice of the Interstate Commerce Commission concerning this case; are you familiar with that company?

A. I surely am.

Q. I wish you would state whether or not Ziffrin Truck Lines, Incorporated, is a corporation?

A. It is.

[fol. 554] Q. I will ask you whether or not it is a corporation existing under and by virtue of the laws of the state of Indiana?

A. It is.

Q. I will ask you whether or not its principal place of business is the city of Indianapolis, Indiana?

A. It is.

Q. I will ask you whether or not its business is that of transportation of property by motor vehicle in interstate commerce, as a common carrier?

A. Its business is that of transporting property as a common carrier in interstate commerce.

Q. Mr. Ziffrin, I wish you would state for the record, the stockholders of Ziffrin Truck Lines, Incorporated?

A. Myself, Sam Ziffrin; Esther Ziffrin, who is my wife; Dave Ziffrin, who is my son; and Louis Ziffrin, who is also my son.

Q. I wish you would state for the record the members of the board of directors of Ziffrin Truck Lines, Incorporated.

A. The same stockholders constitute the board of directors. They keep me pretty well under control.

Q. When you mention the same stockholders, do you mean the stockholders of Ziffrin Truck Lines, as you have just given, is that right?

A. Yes, sir.

Q. What official connection do you have, if any, with the Ziffrin Truck Lines, Incorporated?

[fol. 555] A. I am president of that company.

Q. At my request have you obtained from the Secretary of State of the state of Indiana, a certified copy of the articles of incorporation of the Ziffrin Truck Lines, Incorporated?

A. I have.

Q. Have you that here with you?

A. I have.

Mr. Ellis: Mark that the next exhibit, No. 5.

(Applicant's exhibit 5 marked for identification.)

By Mr. Ellis:

Q. Mr. Ziffrin, I hand you a paper which, for the purposes of identification the reporter has marked exhibit 5, and ask you to state what that is?

A. That is a certified copy of the incorporation of the Ziffrin Truck Lines, Incorporated.

Mr. Ellis: We now offer in evidence exhibit 5.

Exam. Lawton: Which will be received.

(Applicant's exhibit 5, witness Ziffrin, received in evidence.)

By Mr. Ellis:

Q. Mr. Ziffrin, directing your attention to Ziffrin, Incorporated, the contract carrier, did that company seasonably file with the Interstate Commerce Commission, an application under the grandfather clause to continue business as a contract carrier, in interstate commerce?

A. It did.

Q. Since the enactment of the federal Motor Carrier Act, [fol. 556] has Ziffrin, Incorporated, operated as a contract carrier by motor vehicle, complying with rules and regulations promulgated by the Interstate Commerce Commission for contract carriers?

A. It has.

Q. Directing your attention to Ziffrin Truck Lines, Incorporated, did that company seasonably file with the Interstate Commerce Commission an application under the grandfather clause seeking authority to continue to do business as a common carrier of property in interstate commerce?

A. It did.

Q. Has Ziffrin Truck Lines, Incorporated, operated as a common carrier of property in interstate commerce since the enactment of the Federal Motor Carrier Act and complied with the rules and regulations promulgated by the Interstate Commerce Commission for common carriers by motor vehicle?

A. It has.

Q. I will ask you whether or not, Ziffrin, Incorporated, the contract carrier company, pays and has paid federal income taxes to the United States government?

A. It has.

Mr. LaTourette: Objection.

By Mr. Ellis:

Q. Do you have present here with you, copies of the Federal income tax reports of Ziffrin, Incorporated?

Mr. Goodman: I object. I do not see any relevancy.

Exam. Lawton: Overruled.

[fol. 557] By Mr. Ellis:

Q. Mr. Ziffrin, I will ask you whether or not Ziffrin Truck Lines, Incorporated, pays and has paid the federal income tax to the United States Government?

A. It has.

Q. Do you have present here in the hearing room, copies of the income tax reports of the common carrier, Ziffrin Truck Lines, Incorporated?

A. I have.

Q. Mr. Ziffrin, I will ask you whether or not Ziffrin, Incorporated, the contract carrier, pays and has paid gross income tax to the state of Indiana, where the corporation is domociled?

A. I sure have, plenty of it.

Q. Do you have records of that here, Mr. Ziffrin?

A. Yes, sir, I have.

Q. I will ask you whether or not Ziffrin Truck Lines, Incorporated, the common carrier, pays and has paid gross income tax to the state of Indiana, where it is domiciled?

A. It has.

Q. Do you have copies of those reports here with you?

A. I have.

Q. Mr. Ziffrin, does Ziffrin, Incorporated, the contract carrier, pay to federal — state governments, social security, unemployment compensation insurance, and other state and federal taxes or assessments?

[fol. 558] Q. Mr. Ziffrin, I will ask you whether or not Ziffrin Truck Lines, Incorporated, the common carrier, pays and has paid to the state and federal government social security, and unemployment insurance tax, and other federal and state taxes and insurance assessments of that nature?

A. Yes, sir.

Q. Mr. Ziffrin, does Ziffrin, Incorporated, the contract carrier, have employes who work exclusively for that company?

A. They have.

Q. Mr. Ziffrin, does Ziffrin Truck Lines, the common carrier, have employes who work exclusively for that company?

A. It has.

Q. Mr. Ziffrin, do Ziffrin, Incorporated, and Ziffrin Truck Lines have some employes who work part time for one company and part time for the other company?

A. They have.

Q. What is the reason for that?

A. Well, not enough work to keep the employes busy in one thing, and it is a matter of economy and keeps down our overhead. They not only work for the Ziffrin Truck Lines and Ziffrin, Incorporated, but they work for some other truck lines, common carriers. It is a case where, at the Ziffrin terminals they pool certain work, and detail work there, that can very easily by handled by the same employes. It has cut down over overhead considerably by allowing the [fol. 559] employes to intermingle on certain classes of work.

Q. Mr. Ziffrin, are the books and records of Ziffrin, Incorporated, the contract carrier, which are prescribed by the Interstate Commerce Commission for contract carriers, and those other records which corporations usually keep, separate and distinct records from any other company?

A. Absolutely separate. We have made returns to the Interstate Commerce Commission as Class-1 operators.

Q. Mr. Ziffrin, are the books and records of Ziffrin Truck Lines, Incorporated, the contract carrier, which are required by the rules and regulations of the Interstate Commerce Commission such books as are usually kept by corporations, kept entirely separate and distinct from any other corporations?

A. Absolutely.

Q. I wish you would state whether or not it is a fact that an examiner or auditor from the Interstate Commerce Commission called at the place of business of Ziffrin, Incorporated; within the last month or so unexpectedly, and inspected your books?

A. The last two months a gentleman by the name of Mr. Gaunt.

Q. Did that gentleman also inspect, and have access to the books and records of Ziffrin Truck Lines?

A. Yes, sir.

Exam. Lawton: We will run along until a quarter of six.

[fol. 560] Mr. Ellis: All right.

By Mr. Ellis:

Q. Mr. Ziffrin, does Ziffrin, Incorporated, and has Ziffrin, Incorporated, on, before, and continuously since July 1, 1935, transported alcoholic liquors?

A. Yes, sir.

Q. Mr. Ziffrin, has Ziffrin Truck Lines, Incorporated, on, before, and continuously since June 1, 1935, transported alcoholic liquors?

A. Yes, sir.

Q. Mr. Ziffrin, does Ziffrin, Incorporated, the contract carrier, hold an alcoholic beverage permit from the United States government?

A. It does.

Q. Did you make an application for that in the name of Ziffrin, Incorporated, and was it issued to you?

A. Yes, sir.

Q. What department of the government issued that?

A. The Federal Alcoholic Liquor Control Board.

Q. Mr. Ziffrin, does Ziffrin Truck Line, Incorporated, hold an alcoholic beverage permit from the United States Government?

A. It does.

Q. Was application made to the proper federal department in the name of Ziffrin Truck Lines, Incorporated, the common carrier, for that, and was it issued to you?

A. Yes, sir.

[fol. 561] Q. You have it now?

A. Yes, sir.

Q. You have got that here with you, have you?

A. Yes, sir.

Q. Both of them that you referred to?

A. Yes, sir.

Q. I wish you would state whether or not a permit, or authority of some kind to transport alcoholic liquors is required by the state of Indiana, both inter and intrastate operators?

A. It is.

Q. It has been since the enactment of the alcoholic—the alcohol control act in Indiana—in 1933 or 1934?

A. Yes, sir.

Q. Now, directing your attention to Ziffrin, Incorporated, the contract carrier, I will ask you whether or not it holds authority from the state of Indiana to transport alcoholic liquors?

A. Yes, sir.

Q. Did you make application in the name of Ziffrin, Incorporated?

A. Yes, sir.

Q. The contract carrier, to the state of Indiana, for that permit?

A. Yes, sir.

Q. Was it issued to you?

[fol. 562] A. Yes, sir.

Q. Do you have it here with you now?

A. Yes, sir.

Q. Mr. Ziffrin, did Ziffrin Truck Lines, Incorporated, the common carrier, make application to the state of Indiana for a permit to transport alcoholic liquors?

A. It has.

Q. Did you receive such a permit for the common carrier, Ziffrin Truck Lines, Incorporated?

A. I did.

Q. Do you have that permit here with you now?

A. I have.

Q. Mr. Ziffrin, I want to direct your attention now to the state of Kentucky. I will ask you whether or not the state

of Kentucky has, and does now, or it purports to now, require certain permits from carriers to transport alcoholic liquors?

A. It does.

Q. Did you under that law in Kentucky, in behalf of Ziffrin, Incorporated,—or Ziffrin, Incorporated, the contract carrier, make application to the state of Kentucky and receive a permit to transport alcoholic liquors down there?

A. It did.

Q. I will ask you whether or not Ziffrin Truck Lines, Incorporated, under the old law in Kentucky, made application to the state of Kentucky and received authority to [fol. 563] transport alcoholic liquors in the state of Kentucky?

A. It did.

Q. As a common carrier?

A. It did.

Q. I will ask you whether or not the state of Kentucky, during the current year at the session of its general assembly, passed a new law in regard to alcoholic liquor transporters' licenses in that state?

A. It did.

Q. Whether or not that was supposed to become effective on or about July 1, 1935?

A. That is correct.

Q. I will ask you whether or not, if you know, did that law of the state of Kentucky purport to say that transporters' licenses would only be issued to common carriers by motor vehicle?

A. That is correct.

Q. I will ask you if not first in behalf of Ziffrin Truck Lines, the common carrier, you made application to the state of Kentucky for a transporter's licensee under the new act?

A. I did.

Q. Was such transporter's license issued by the state of Kentucky to the common carrier, Ziffrin Truck Lines, Incorporated?

A. It was.

Q. I will ask you whether or not you also made applica- [fol. 564] tion to proper officials of the state of Kentucky, for Ziffrin, Incorporated, the contract carrier, for a liquor permit, in that state?

A. We did.

Q. I will ask you whether or not that was denied to you?

A. It was denied.

Q. On the ground they would not issue it to you as a contract carrier?

A. That was their reason.

Q. I will ask you whether or not then, and I am referring you to Ziffrin, Incorporated, and I will ask you whether or not Ziffrin, Incorporated, the applicant in this case, did not file in the United States District Court for the Eastern District of Kentucky, a case in equity No. 1210, entitled Ziffrin, Incorporated, plaintiff, versus James W. Martin, Commissioner of Revenue, et al., defendants? Did Ziffrin, Incorporated do that?

A. It sure did.

Q. I will ask you whether or not the counsel now interrogating you was the counsel in the proceeding?

A. He was.

Q. I will ask you whether or not immediately upon the filing of that bill of complaint, the Judge in the United States District Court for the Eastern District of Kentucky, issued a restraining order restraining officials of the state [fol. 565] from interfering with the operations of Ziffrin, Incorporated, as a contract carrier, transporting liquor in interstate commerce?

A. The court did issue such an order.

Q. I will ask you whether or not the matter then came up before a three-judge federal court in the city of Lousiville?

A. Yes.

Q. Whether or not that court continued an injunction against the state of Kentucky?

A. It did.

Q. I will ask you whether or not Ziffrin, Incorporated, the contract carrier, has continuously operated as a transporter of alcoholic liquors in interstate commerce out of the state of Kentucky?

A. It has.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record.

By Mr. Ellis:

Q. Mr. Ziffrin, does Ziffrin, Incorporated, hold a so-called interstate contract carrier permit from the state of Indiana, issued by its Public Service Commission?

A. Yes, sir.

Mr. Ellis: I might say off the record again——
Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record.

[fol. 566] By Mr. Ellis:

Q. Does and did Ziffrin, Incorporated, the contract carrier, hold the contract carrier permit for interstate commerce in the state of Ohio?
A. It does.
Q. Does Ziffrin Truck Lines, the common carrier, hold a common carrier certificate from the Public Service Commission of Indiana?
A. It does.
Q. Does it hold the common carrier certificate in Ohio?
A. It does.
Q. Mr. Ziffrin, does Ziffrin Truck Lines, Incorporated, own some motor vehicle equipment, and hold title thereto?
A. It does.
Q. Do you have the certificates of title issued by the state of Indiana here with you and present in the hearing room?
A. I have some of them.
Q. Does Ziffrin, Incorporated, the contract carrier, own motor vehicle equipment?
A. It does.
Q. Do you have some of those certificates of title present with you in the hearing room?
A. I have.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record.

[fol. 567] By Mr. Ellis:

Q. Mr. Ziffrin, does Ziffrin, Incorporated, the applicant in this case exercise any control or management over or of Ziffrin Truck Lines, Incorporated, the common carrier?
A. Absolutely not.
Q. Mr. Ziffrin, does Ziffrin Truck Lines, Incorporated, the common carrier, exercise any control or management over Ziffrin, Incorporated, the applicant in this case?
A. No, sir.

Mr. Ellis: We will be glad to break off now, if it is agreeable to everybody.

Exam Lawton: Just one question.

By Exam. Lawton:

Q. Which two officials are common to both companies, you named them there.

A. Just myself.

Q. Just yourself.

A. Yes, the only one.

Exam. Lawton: We will recess.

By Mr. LaTourette:

Q. That is at the present time?

A. That is the way it has been all of the time.

Q. You mean the offices?

A. All the time.

Q. Have been that way all of the time?

A. All the time. That is, so far as my own self is concerned. I have been president of both companies.

[fol. 568] Exam. Lawton: I think we had better break off here until 9:00 o'clock tomorrow morning.

(At 5:45 P. M., September 12, 1938, an adjournment was taken until 9:00 o'clock A. M., September 13th, 1938.)

[fol. 569] Indianapolis, Indiana,
September 13, 1938. 9:00 a.m.

Before: H. C. Lawton, Examiner, Interstate Commerce Commission.

Met pursuant to adjournment.

Appearances: The same as before.

Proceedings

Exam. Lawton: Come to order, gentlemen. We will proceed with the hearing. Mr. Ziffrin will resume the stand.

Mr. Ellis: May I proceed, Mr. Examiner?

Exam. Lawton: Yes, you may proceed, Mr. Ellis.

Sam Ziffrin, resumed, previously sworn and further testified as follows:

Direct examination.

By Mr. Ellis:

Q. You are the same Sam Ziffrin who was on the witness stand at the time of adjournment of yesterday's session of this hearing?

A. I am.

Q. I believe at that time you had been testifying as to Ziffrin, Incorporated, the applicant in this case, Ziffrin Truck Lines, Incorporated, a common carrier, by motor vehicle to which some reference has been made in the notice of hearing, by the Interstate Commerce Commission. Do you recall that?

A. Yes, sir.

[fol. 570] Q. Now, I want to ask you whether or not the applicant in this case, Ziffrin, Incorporated, and Ziffrin Truck Lines, the common carrier, rendered the same kind of service, or a different kind of service to shippers?

A. A different kind of service.

Q. I will ask you whether or not the applicant in this case, Ziffrin, Incorporated, since it is organized has devoted its service exclusively to those persons, firms and companies or corporations with which it had contracts and has contracts?

A. That is correct, it has.

Q. Have you ever at any time as Ziffrin, Incorporated, solicited freight generally from the general public or held yourself out to serve the public generally?

A. Absolutely not.

Q. I will ask you whether or not Ziffrin Truck Lines, Incorporated, the common carrier, has held itself out to serve the public?

A. They have.

Q. I will ask you whether or not the applicant in this case, Ziffrin, Incorporated on call and demand of the company with which it has contracts, renders a special type of service?

A. Yes.

Q. Neither Ziffrin Truck Lines, Incorporated, the common carrier, involved in this case, nor any other common carrier can furnish——

[fol. 571] Mr. LaTourette: We object to that question on the ground it is a pure conclusion. This witness is not qualified to testify on the service of the other common carriers that they are rendering.

Exam. Lawton: I think your question is a bit broad.

Mr. Ellis: I think the witness is qualified. I will withdraw it and pursue it along another line.

By Mr. Ellis:

Q. I will ask you whether or not, Mr. Ziffrin, the applicant, Ziffrin, Incorporated, does, and is in a position, and has on, before and continuously since July 1, 1935, rendered a different type of motor vehicle carrier service in interstate commerce than that which has been rendered by Ziffrin Truck Lines, Incorporated, the common carrier?

A. It has.

Q. Now, I will ask you whether, last night, after you left this hearing room and visited the offices of the applicant in this case, Ziffrin, Incorporated, you received some information of a demand which had been made on the applicant which illustrates that situation?

A. That is correct.

Q. Please explain to the Examiner and to the Commission just what occurred last night and what demand was made on Ziffrin, Incorporated, the applicant in this case, which differs from the type of demand made on common carriers by motor vehicle?

A. We got a call from Mr. Clyde Cart, by long-distance, [fol. 572] who is traffic manager of the Old Quaker Company at Lawrenceburg. He said that he got the teletype from New York that they immediately had to move 3,500 barrels of whiskey, which contained approximately 500 pounds to a barrel, a sum total of weight around 1,750,000 pounds. It would require 70 trucks to move that, at least 70 trucks, and possibly 75 to 80 trucks, to move that, and we had to move that and get it over to Cincinnati on the boat at 12:00 o'clock tonight. I checked this morning, and half of that job has already been completed. We will have it all completed by tonight.

Q. Does Ziffrin's Truck Lines, Incorporated, render that kind of service?

A. They cannot.

Q. Mr. Ziffrin, there has been an appearance entered in this case, for the American Trucking Association. Do you recall that?

A. Yes, sir.

Q. I will ask you whether or not you, personally, in the first instance, are connected with, or an officer of the American Trucking Association?

A. I am Vice-President, and a member of the Executive Committee.

Q. That is, of the entire association?

A. Yes, sir.

Q. I will ask you whether or not Ziffrin, Incorporated, [fol. 573] the applicant in this case, is a member of the contract carrier division of the American Trucking Association?

A. It is, I am Chairman of the contract carrier division of that association, and general chairman.

Q. You are chairman for the entire United States, of contract carriers' division of the A. T. A., is that right?

A. That is right.

Q. I will ask you whether or not Ziffrin Truck Lines, Incorporated, is a member of the common carrier division?

A. It is.

Q. Of the American Trucking Association?

A. It is.

Q. Mr. Ziffirin, did Ziffirin, Incorporated, to your knowledge, receive notice of this hearing here today, and yesterday?

A. Yes.

Q. I will ask you whether any notice of any kind, of these proceedings, was ever served to your knowledge on Ziffrin Truck Lines, Incorporated?

A. It was not.

Mr. Ellis: Take the witness.

Exam. Lawton: You may cross-examine. Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record. You may cross-examine.

Cross-examination.

[fol. 574] By Mr. Brunow:

Q. What points in Kentucky has Ziffrin, Incorporated served?

A. The territory around Franfort and Lexington.

Q. What commodities has Ziffrin, Incorporated, handled into or out of that territory?

A. Principally alcoholic liquors, and distillers' supplies.

Q. I will ask you over what period has Ziffrin, Incorporated handled those various commodities to or from that territory?

A. Between the period on and after July 1st, 1935, and August, 1937.

Q. Why did Ziffrin, Incorporated, discontinue serving that territory on August, 1937?

Mr. Ellis: Wait just a minute. I do not want to object to the question. He said he explained that fully; if you want it in here again, it is all right with me.

Exam. Lawton: Do you want the question answered?

Mr. Brunow: I believe I must have been absent when he explained it.

Exam. Lawton: I think he did. He may answer that question.

The Witness: Because it was at the insistence, an agreement that we made with the member of the Interstate Commerce Commission.

By Mr. Brunow:

Q. Does Ziffrin, Incorporated, have a contract carriers' permit from the state of Kentucky?

[fol. 575] A. No, sir, not now.

Q. Did it ever have?

A. It did.

Q. When was that granted?

A. In 1935 and 1936.

Q. What was the reason for its discontinuance?

A. That you will have to ask some of your boys down in Kentucky. I never have been able to find out yet.

Q. Was it discontinued then, on the initiative of the Kentucky Department of Motor Transportation?

A. I never could get any information. I know we could not get a renewal.

Q. It was not discontinued at your own request, however, was it?

A. At our own request?

Q. Yes.

A. No, sir.

Q. What points did the permit, contract carrier's permit which you did have, from Kentucky, cover?

A. Anywhere in the state of Kentucky, to handle liquor and distillers' supplies.

Q. Were those the only commodities it covered?

A. That is all.

Q. Did Ziffrin, Incorporated, apply for a common carrier certificate from the state of Kentucky?

[fol. 576] A. No, sir.

Q. At no time?

A. At no time.

Q. I will hand you a notice from the division of motor transportation of the state of Kentucky, and ask you if that does not state that Ziffrin, Incorporated, are making application for a common carrier certificate?

Mr. Ellis: Wait a minute. I object. You cannot hand the witness a piece of paper and ask him some questions about it. If you will mark it as an exhibit and attempt to have it identified, it might be proper.

Exam. Lawton: I think you had better have it identified.

Mr. Brunow: Will you identify it? I would like to offer this as an exhibit.

(Protestants' Exhibit 6 marked for identification.)

By Mr. Brunow:

Q. Mr. Ziffrin, I will now hand you protestants' Exhibit No. 6, and ask you if that is not a notice from the department of motor transportation of the state of Kentucky setting for a hearing, an application of Ziffrin, Incorporated?

A. That is.

Q. For a certificate as a common carrier, and ask you to identify it?

A. Yes.

Exam. Lawton: The answer was yes?

[fol. 577] The Witness: Yes. That is dated June, 1938.

Mr. Brunow: That is right.

The Witness: It also has on there, Ziffrin Truck Lines.

By Mr. Brunow:

Q. That is right. Relative to the statement you made just awhile ago on your direct examination in regard to the movement of liquor from Lawrenceburg, Indiana, is that correct?

A. That is correct.

Q. Just why could Ziffrin, Incorporated, not handle that particular movement?

A. They do not have the guard system, and the special trucks that is necessary to handle it.

Q. Well, you say that is a limitation which you apply indiscriminately to all common carriers?

A. Yes, on that kind of a movement. As a matter of fact, Mr. Cart, over the phone, said he couldn't get any common carrier to handle it.

Mr. LaTourette: We will object to that as not being material.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record. Read the question.

(Question read.)

The Witness: Yes. With the further fact that is the [fol. 578] limitation that the distillers themselves are putting on it.

Mr. LaTourette: We object to that as not being responsive.

By Mr. Brunow:

Q. Do you mean to say, Mr. Ziffrin, you can state under oath there is no common carrier in this area or territory that cannot handle that shipment under any circumstances today?

A. I don't think so.

Mr. Brunow: That is all for the present.

Exam. Lawton: You may continue the cross-examination.

By Mr. Thomas:

Q. Please tell us, if the trucks of the Ziffrin Truck Lines, Incorporated, are owned by the Ziffrin Truck Lines, Incor-

porated, or Ziffrin, Incorporated, or if they are owned jointly?

Mr. Ellis: I object to that. He has testified that they own their own trucks. I do not get the import of the question. I don't think the witness can understand it.

Mr. Thomas: I will word the question differently.

Exam. Lawton: Rephrase it.

By Mr. Thomas:

Q. I want to know if the Ziffrin Truck Lines, Incorporated, and Ziffrin, Incorporated, jointly own any of the trucking equipment of the two companies?

A. No, sir.

[fol. 579] Q. I would like to ask you if freight is hauled for Ziffrin Truck Lines, Incorporated, or Ziffrin, Incorporated, in the same truck?

A. Never in the same truck.

Q. I want to ask you if your trucks do not carry the same lettered—the same lettering on the outside of both companies?

Mr. Ellis: Wait a minute. I object. He said your trucks. There is no evidence here that Mr. Sam Ziffrin owns any trucks. You will have to identify what truck he is talking about.

Exam. Lawton: Read the question.

(Question read.)

Exam. Lawton: Overruled. He may answer.

The Witness: I don't have any trucks myself. If you will change that question, I will willingly answer it. I do not have any trucks.

By Mr. Thomas:

Q. I am not talking to your personally, Mr. Ziffrin,

A. You said, "your trucks".

Q. Your companies' trucks. You are president of both companies.

A. I will give you that whole answer and save you a lot of questions: we have a lot of trucks that bear the lettering of both Ziffrin Truck Lines, Incorporated, and Ziffrin, In-

[fol. 580] corporated, for the reason the state of Indiana requires us to do that. Yes, sir. I admit that.

Exam. Lawton: The answer will stand.

By Mr. Thomas:

Q. I believe you said awhile ago the principal reason Ziffrin Truck Lines, Incorporated, could not handle or haul whiskey contained in the shipments you spoke of as occurring today, was because Ziffrin, Incorporated, did not maintain a guard system to check them?

A. That is right.

Q. Is it not true that you run convoys of trucks? I don't mean you, pardon me. Is it not true Ziffrin Truck Lines, Incorporated, run convoys of trucks out of Louisville with regard to protection?

A. Never, not Ziffrin Truck Lines.

Q. Do you put trucks of Ziffrin Truck Lines, Incorporated, in the same convoy with trucks containing shipments of Ziffrin, Incorporated, in the same convoy?

A. No, sir, not with freight of Ziffrin Truck Line trucks.

Q. Mr. Ziffrin, you haul a large volume of whiskey shipments out of Louisville, Kentucky, under the billing of the Ziffrin Truck Lines, Incorporated, do you not?

A. Yes, sir; I testified.

Q. Yes. Do you run those trucks under convoy, or are they unprotected?

A. No, they run with Babaco alarm trucks.

[fol. 581] Q. Isn't it possible that Ziffrin Truck Lines, Incorporated, the common carrier, can furnish the same type of service and protection to their shippers as Ziffrin, Incorporated?

A. I don't think so.

Q. Why?

A. Well, because Ziffrin Truck Lines is a common carrier and hauls everything, and anything. If they commit Ziffrin Truck Lines, say like they did last night, "We want you to haul 70 loads of whiskey," it would be physically impossible. It was not only physically impossible for us; it was physically impossible for Keeshin to help out with more than 5 trucks last night.

Mr. Goodman: I object to that.

Exam. Lawton: Strike the last part of that answer. That is not called for in this proceeding. I take it, Mr. Ziffrin,

that what you are endeavoring to convey, is the fact in a common carrier operation you might have on a truck, whiskey, canned goods and hardware, on the same truck?

The Witness: Not only that, but if we took away all of the trucks from the common carrier, we couldn't handle anything else. What about our other 2,800 customers that have to be served on Ziffrin, Incorporated? That is all we did last night. We put the whole works on whiskey. Not only that——

Exam. Lawton: That is enough.

[fol. 582] By Mr. Thomas:

Q. Is it not true, Mr. Ziffrin, on some days you handle as many as five or six trucks loaded solid with whiskey, out of Louisville, operating under Ziffrin Truck Lines, Incorporated?

A. That is possible.

Q. And in those trucks no other freight is allowed?

A. Absolutely not. On Ziffrin Truck Lines trucks?

Q. Yes.

A. Oh, yes, there might be.

Q. You say there might be?

A. On Ziffrin Truck Lines, yes; not only might be, but there is.

Q. In case there is, those instances where there is no common carrier of general commodity freight allowed in that truck, the trucks, the trucks are solidly loaded with whiskey, don't you give those trucks the same type of service as you would a shipment moving under Ziffrin, Incorporated?

A. If it is whiskey moving out of Louisville in solid loads, and I take it you are referring to your own shipments that you transfer to us.

Q. Yes, that is right.

A. In that case, you will find that the front truck and the back truck would be Babaco alarm trucks. That is the protection that the Ziffrin Truck Lines gives to whiskey. No guard service, and no cars following those trucks unless there happens to be a Ziffrin, Incorporated, convoy, and [fol. 583] it is our experience that not only our own trucks, but we have those of the Indianapolis Motoring Company and all of the other, the other trucks get into our convoy, and we are being blamed for having too big a convoy.

They know we have got guards on the highway. They know we got guards on the convoy. Yes, in fact that is in common practice.

Q. Isn't it true, Mr. Ziffrin, each night you have ever moved out of Louisville, you have a guard on for both corporations?

Mr. Ellis: I am going to object to that. He has answered it two or three times.

Mr. Thomas: That is a good question.

Exam. Lawton: It is rather repetitious. I will permit the answer.

By Mr. Thomas:

Q. Every night, I said.

A. The question before that?

Q. In both corporations, do you ever have a guard go along?

A. Yes, surely. When both of them are there.

Q. What was the last trip you made from the interior of Kentucky to Louisville?

Mr. Ellis: I object to that. What difference does it make when Mr. Ziffrin went out of Kentucky?

Exam. Lawton: Are you speaking of the common carrier?

Mr. Thomas: Ziffrin, Incorporated.

[fol. 584] Exam. Lawton: When was the last trip?

By Mr. Thomas:

Q. When?

A. With trucks?

Q. Yes.

A. I would say it was back in 1937.

Q. That is rather general, Mr. Ziffrin, can you give us more, or some specific time?

A. No.

Q. Can't you tell us what month it was?

A. I would be afraid to guess. It was a month prior——

Q. Mr. Ziffrin, can you tell me whether that last truck carried a load from Louisville to destination, or from a point of origin in Kentucky, moving back toward Louisville?

A. I would have to check the record.

Q. Can you tell me the shipper or the consignee?

A. I could but I don't believe I will.

Q. You refuse to state that?

A. Yes, for the time being.

Q. Would you give me the point of origin and destination?

A. I am not prepared to give you that.

Q. Mr. Ziffrin, in your application, I believe you limit the scope of your operation to an area of 150 mile radius of Louisville?

A. That is right.

Q. And I believe since then you have testified that you [fol. 585] only want to serve two towns, Frankfort and Lexington?

Mr. Ellis: He has not testified to any such thing.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

By Mr. Thomas:

Q. Mr. Ziffrin, has your company, Ziffrin, Incorporated, ever served a certain town of Bardstown, Kentucky?

A. I don't know.

Q. Has it ever served the town of Fairfield, Kentucky?

A. I don't know.

Q. Has it ever served the town of Nazareth, Kentucky?

A. I am not sure.

Q. Has Ziffrin, Incorporated, ever hauled any whiskey shipments out of Athertonville, Kentucky?

A. I couldn't tell you.

Q. Has Ziffrin, Incorporated, hauled any shipments out of Lexington, Kentucky?

A. Yes, sir.

Q. Can you give me some idea as to when?

A. No, I can't.

Q. Can you name the distillery located in Covington, Kantucky?

A. I can.

Q. You can?

A. Yes, sir.

Q. Do you know the distillery located in Anchorage, Kentucky?

[fol. 586] A. I believe I do.

Q. What distillery is that?

A. Dant. That is correct, isn't it?

Q. No, sir. It is Waterfield-Frazier, to be correct. Can you name the distillery located in Chicago, Kentucky?

A. Name what?

Q. The distillery located in Chicago, Kentucky?

A. What?

Q. There is only one.

A. No, I can't.

Q. Can you name the distillery located at Frankfort, Kentucky?

A. Yes, I can name a few.

Q. What are they?

A. There is George T. Stagg Company, Old Crow. Those are the main ones.

Q. Did you ever haul any whiskey from the George T. Stagg Company?

A. Pardon me?

Q. Has Ziffrin, Incorporated, hauled any whiskey from George T. Stagg Company?

A. Yes.

Q. Can you cite me any specific instance?

A. Not now. I could.

Q. Will you?

A. Yes, I think we will have that in our documentary evidence.

[fol. 587] Q. You would not want to deprive counsel for Reliance Trucking Company, the Board or Examiner, this evidence?

Mr. Ellis: Wait a minute.

Exam. Lawton: Off the record. Read the question.

(Question read.)

Exam. Lawton: I will let it stand.

The Witness: The answer to that is that whatever agreement my counsel makes with the opposing counsel, is certainly going to be satisfactory to me.

By Mr. Thomas:

Q. Mr. Ziffrin, you testified awhile ago that the state of Kentucky granted you a contract carrier permit in the year 1936, did you not?

A. I did.

Q. And I believe you stated that permit was revoked by the state?

A. They refused to renew it.

Q. Isn't it true that this permit was revoked, within ten days after its issuance by the state, and that Ziffrin, Incorporated, did not get the permit at all?

A. I know of no such incident.

Q. Isn't it true that Ziffrin, Incorporated made application to the state of Kentucky on two different occasions on which those applications were denied for a contract carrier permit?

A. Yes, that is possible. We have been trying to get it for a long time, even as late as June, 1938. That is why we [fol. 588] got them in the federal court.

Q. Do you have personal knowledge of the volume of business you handle out of Kentucky during the period you named?

A. No.

Q. As Ziffrin, Incorporated?

A. No, I do not hold or consult the records.

Q. Has it been continuous up to the time you say, of 1937, when you discontinued operation?

A. Generally so.

Q. Do you maintain terminals in the city of Lexington?

A. No, sir.

Q. Frankfort?

A. No, sir.

Mr. Ellis: I am going to object to the questions, "Do you". That is as far as investigation into alleged duplicity here.

Mr. Thomas: That is a good question.

Mr. Ellis: If counsel for Reliance Trucking Company cannot confine his questions to Ziffrin Truck Lines, and Ziffrin, Incorporated, there is going to be a good deal more objecting in the record.

Exam. Lawton: I think it is understood the question is directed to the applicant, or the other company.

Mr. Loughry: You can't tell. He says "You".

Mr. Thomas: He is the president.

[fol. 589] Exam. Lawton: He can state whether he personally knows they have terminals or not.

By Mr. Thomas:

Q. Do you maintain a terminal?
A. No, I do not.
Q. In Frankfort or Lexington, or both?
A. No, I do not.

Mr. Thomas: Off the record. I am finished with the witness.

Exam. Lawton: You can show on the record, Mr. Reporter, that the Examiner is not attempting to curtail the cross-examination of counsel. Have you anything further?

Mr. Thomas: No, I would not insinuate that, Mr. Examiner.

Exam. Lawton: You may proceed.

By Mr. LaTourette:

Q. Mr. Ziffrin, yesterday in response to direct examination, you testified with reference to the stockholders, directors and officers of Ziffrin, Incorporated.
A. That is right.
Q. Do you recall that?
A. Yes.
Q. As of what date did your testimony apply to?
A. Well, that could apply as far back as 1934 or 1935.
Q. I do not want to know how far it could apply. I want to know to what date your testimony related when you mentioned the names of stockholders, directors and officers [fol. 590] of Ziffrin, Incorporated?
A. The same stockholders I mentioned, are the same stockholders that were in existence at the time of the incorporation. There has been no change made whatever.
Q. How about directors?
A. The same set of directors of Ziffrin Truck Lines.
Q. I am speaking now, let us not confuse you. Just so that you understand what I am talking about, I am talking about Ziffrin, Incorporated.

Mr. Loughry: He answered your question.

The Witness: That is the same people all the way through from the time it was incorporated.

By Mr. LaTourette:

Q. Just so that I understand you clearly, you are testifying now that the same stockholders and directors have

prevailed in the management of Ziffrin, Incorporated, from the time of its incorporation?

A. Yes, sir.

Q. Or from what date?

A. From the time of its incorporation.

Q. As a matter of fact, they are entirely different incorporators, were they not, as reflected by the articles of incorporation which you filed?

Mr. Loughry: To which question we object because the question of who are the incorporators of the individual incorporation, does not make any difference, I don't think, [fol. 591] about stockholders, or directors, or anything else.

Exam. Lawton: Just a minute. No argument, now. What was the question.

(Question read.)

Exam. Lawton: Overruled. He may answer.

The Witness: The incorporators on the first day of the incorporation was a different set. On the second day of the incorporation, the stockholders that I mentioned, and the directors went in and have stayed in ever since.

Q. In discussing the names of the officers of Ziffrin, Incorporated, you mentioned your name as president; who were the other officers of Ziffrin, Incorporated?

A. I mentioned the other officers.

Q. My memorandum here shows you testified only to yourself as president. Who were the other officers of Ziffrin, Incorporated?

A. Mr. S. O. Berman, Logansport, Indiana. Mr. Berger of Arverne, New York.

Q. How long have those officers been officers of Ziffrin, Incorporated?

A. All the way through.

Q. All the way through.

A. Yes.

Q. Your corporation makes regular annual reports to the state of Indiana, does it not, setting forth the officers [fol. 592] of the corporation, does it not?

A. Surely.

Q. You made such a report in 1937, I assume, did you not?

A. I think we did.

Q. Are you acquainted with E. Ziffrin?
A. Surely.
Q. Who is that?
A. Assistant secretary.
Q. Is that any relative of yours?
A. That is my wife.
Q. That is your wife?
A. Yes, sir.
Q. Did your corporation report to the state of Indiana that the officers of Ziffrin, Incorporated as of——
A. That is, E. Ziffrin is not an officer, understand.
Q. Just a minute. Did you report to the secretary of state of Indiana that as of June 30, 1937, for the year ending that day, S. Ziffrin was president of Ziffrin, Incorporated?
A. Yes, sir.
Q. E. Ziffrin, treasurer?
A. Yes.
Q. S. Berman, secretary?
A. I don't know. I don't think so.
Q. Well, what is your recollection on that?
A. I would not know without I see the report.
[fol. 593] Q. You would not know?
A. No, sir.
Q. Would you know who is treasurer of Ziffrin, Incorporated, or who was in 1937?
A. Yes, I would know who was treasurer in 1937.
Q. Who was it?
A. R. Levi.
Q. R. Levi?
A. Yes.
Q. If your corporation reported to the state of Indiana that E. Ziffrin was treasurer of the company as of that date, and that report was made under oath, what would your conclusion be?
A. I would say that the matter was that of confusing Ziffrin Truck Lines with Ziffrin, Incorporated. She is so doggone used to signing for the other company, it was a mistake on her part.
Q. That is on the certificate for Ziffrin, Incorporated, also.
A. Yes.
Q. As treasurer?
A. No, sir, not as treasurer.

Q. Does she sign checks for Ziffrin, Incorporated?

A. Just, E. Ziffrin, as treasurer, on the checks.

Q. She does sign checks for Ziffrin, Incorporated?

A. She surely does.

[fol. 594] Q. Is it true as of June 30th, 1937, the officers of Ziffrin Truck Lines, Incorporated, the common carrier, were S. Ziffrin, President; E. Ziffrin, Secretary and Treasurer; D. Ziffrin, and L. Ziffrin, both Vice-Presidents?

A. That is correct.

Q. You want to tell the Commission, if your corporation, Ziffrin, Incorporated, reported to the state that E. Ziffrin was Treasurer of Ziffrin, Incorporated, that was a mistake?

A. Absolutely.

Q. Would you say that if Ziffrin, Incorporated, reported to the state of Indiana in 1936 and 1935 that E. Ziffrin was Treasurer of Ziffrin, Incorporated, that was also a mistake?

A. It was.

Q. You made the mistake in three successive years?

A. If that was the way it was reported. I don't know. that we have.

Q. You would still say that the same mistake was made in three successive years?

A. If she signed it as treasurer, I would say it is the same mistake, whether it is three, four, five, six, or ten times.

Q. I am asking you, under the circumstances where she signed as treasurer, I am speaking now of the report of the treasurer of Ziffrin, Incorporated to the Secretary of States, if she signed as treasurer, if the report says she was treasurer, it so showed it in 1937, 1936, and 1935——

[fol. 595] A. Yes.

Q. That in each of those successive years there has been an erroneous report made to the state?

A. That is right.

Q. Is that your testimony?

A. That is my testimony. She should have signed, Assistant Treasurer.

Q. Then, she is Assistant Treasurer of Ziffrin, Incorporated?

A. That is right. That is not an officer.

Q. If the report to the state of Indiana as to the officers of Ziffrin, Incorporated for 1937, 1936 and 1935, did not show E. Ziffrin, as Assistant-Treasurer, that is also a mistake, is that right?

A. It is a mistake, if she signed it as treasurer.

Q. I am not talking about her signing anything. I am talking about the corporation report to the Secretary of State.

Mr. Ellis: We object to that because the corporation report does not require the reporting of any assistant treasurer. The assistant treasurer is simply a clerical position.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton. He may answer.

The Witness: Repeat that question a ain.

(Question read.)

[fol. 596] The Witness: What, the corporation report?

By Mr. LaTourette:

Q. Yes.

A. Absolutely not. The corporation report is correct. The only thing that is wrong is the title to E. Ziffrin's signature.

Q. I don't think you understood that question, in fairness to you.

Mr. Ellis: Who will understand it, in fairness to you?

Mr. LaTourette: It is not responsive.

Exam. Lawton: He will reframe the question.

Mr. LaTourette: The question is all right. The answer is not responsive. The last question was read.

The Witness: A mistake in the title.

Mr. LaTourette: I see.

By Mr. La Tourette:

Q. Now, I believe he testified that Mr. Berger is located in New York?

A. Yes, sir, Arvern, New York.

Q. What is his connection, in a business way?

A. He is a stockholder in the corporation.

Q. What is his other business connection?

A. I don't know.

Q. You don't know?

A. No, I do not.

Q. Is it because you do not want to tell this Commission, that you say that?

[fol. 597] A. No, I said I don't know.

Q. You don't know?

A. No.

Q. Is he connected with the liquor house in New York?

A. I don't know.

Q. What is your best recollection as to that?

A. I haven't any recollection as to what business he is in.

Q. When he became interested in Ziffrin, Incorporated, as you say he did, where did the transaction take place, at which time he purchased his interest in Ziffrin, Incorporated?

Mr. Ellis: I am going to object to that. This gentleman, who is under discussion here has a right to purchase stock in Ziffrin, Incorporated, and where he did it or how he did it, is no concern of this Commission, or of Mr. LaTourette, either one.

Exam. Lawton: I will permit one question. The question may stand.

The Witness: What is the question?

(Question read.)

Mr. Ellis: I am objecting for the further reason, it is not as he says he did; the certified articles of incorporation from the Secretary of State shows he is a stockholder in this company, and not based on any assertion of Mr. Ziffrin.

Mr. Loughry: I can't see how this is pertinent in any way, shape, or form.

[fol. 598] Mr. LaTourette: Now, counsel has made the statement that the articles of incorporation of Ziffrin, Incorporated, show that one Lewis, Berger, was a stockholder. Now, that is the statement on the record, and I will ask him to point out on applicant's exhibit 4, where that is shown in the record.

Mr. Ellis: I will let it stand.

Mr. LaTourette: I move his statement be stricken from the record.

Exam. Lawton: Let us see the record. Off the record.

(Discussion had outside the record.)

Exam. Lawton: Mr. Berger does not appear as an incorporator in either one of the exhibits.

Mr. LaTourette: I believe we have a question that remains unanswered.

(Question read.)

The Witness: I can answer that.

Exam. Lawton: You may answer it.

The Witness: In the offices of Jacob Weiss, attorney here in Indianapolis.

By Mr. LaTourette:

Q. What date was that?

A. That was a day or two following the filing of the articles of incorporation.

Q. Did you file reports with the secretary of state of Indiana, setting forth the names of the directors of Ziffrin, [fol. 599] Incorporated?

Mr. Ellis: I am going to object to asking him whether you did. If you will ask whether the corporation did.

Mr. LaTourette: I will agree with you, Mr. Ellis.

By Mr. LaTourette:

Q. Did Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated, file reports with the Secretary of State of the state of Indiana, setting forth the names of directors of both Ziffrin, Incorporated, and Ziffrin Truck Lines, Inc.?

A. I don't know what the report set forth. Whatever the state of Indiana required of the filing of reports, that we did.

Q. In making those reports, did you report to the state a true statement of the names of the directors of both companies?

A. If that was necessary, the reports will show it.

Q. I say, did you make a true report of the names of those directors?

A. We always make true reports to the state of Indiana, and every other state.

Q. Didn't you say in response to the previous testimony that you made a report to the state of Indiana as to the officers of Ziffrin, Incorporated, which referred to E. Ziffrin, Treasurer, and that was not a true report?

A. The statement I made before, if E. Ziffrin signed her [fol. 600] name as treasurer she inadvertently forgot to put the name "assistant" on, but that was an error.

Q. It was not a true report?

A. The report was true. The signature on there was true, except her title was not put on there properly.

Q. I am not talking about signatures.

A. You are talking about reports.

Q. I am talking about the listing of officers of Ziffrin, Incorporated, in your report to the state of Indiana.

A. I would say they were correct, with the exception of the one mistake.

Q. You also say these reports you made as to the names of the directors of both companies are all true?

Mr. Ellis: I am going to object to that.

By Mr. LaTourette:

Q. You also say that the reports of Ziffrin Truck Lines, of Ziffrin Truck Lines, Incorporated, and Ziffrin, Incorporated, to the state of Indiana, setting forth the names of directors of both companies are also true, is that right?

A. Yes, sir.

Q. Now, I believe you testified that separate books were kept for Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated, is that right?

A. Yes, sir.

Q. As of what date was that separation made?

[fol. 601] A. Ever since it has been in business, both of them have been in business.

Q. Was Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated, involved in a proceeding before the Indiana Commission?

A. They were.

Q. At which time an investigation was made for that body relative to the manner of keeping of books for both companies?

A. That is right.

Q. As the result of that investigation, was an order issued by the Indiana Commission requiring you, after January 1, 1936, to make a separation of the books of both companies?

Mr. Ellis: To which we object. If there was any such order, that order itself would be the best evidence.

By Mr. LaTourette:

Q. Did you, after January 1, 1936, make a separation of the books of Ziffrin Truck Lines, Incorporated, and Ziffrin, Incorporated?

A. There was never any need for any separation. They were always kept separate.

Q. Wasn't a change made in the method of keeping books of the two companies?

A. There was never any change made in the method of the keeping of the books of the two companies, with the exception of changing them to conform with the Interstate Commerce Commission's requirement when their order came out setting up the accounting system.

[fol. 602] Q. Are you sure of that?

A. I am positive of that.

Q. Were you sure of that at the time you testified in the hearing of the application of Ziffrin Truck Lines, Incorporated?

A. Absolutely.

Q. Do you recall your testimony at that time?

A. I think I can.

Q. You were certain at that time that that was the case, is that right?

A. Absolutely.

Q. You were a witness, were you not, in the hearing of the application of Ziffrin Truck Lines, Incorporated, Docket MC 2510?

A. I was.

Q. You are — same Sam Ziffrin that was shown in that record, are you not?

A. Yes, sir.

Q. And do you recall this question being asked you by Mr. Yockey: "Q. Have you made any difference in the manner in which you keep the books in your corporation since the 1st day of January, 1936?" Do you remember that question?

A. Yes.

Q. You remember then of making this answer?

Mr. LaTourette: I might say, Mr. Examiner, the question which I read is propounded to the witness, Ziffrin, in [fol. 603] the hearing on Ziffrin Truck Lines, Incorporated, and appears at page 335 of the record, in that case.

By Mr. LaTourette:

Q. Do you remember making this answer in response to that question of counsel which appears at page 337 of the record in the same case?

Mr. Ellis: Wait just a minute. How do you account for the fact the question was propounded on 335?

Mr. LaTourette: Because we have about two pages of objections and counter argument as between counsel and the witness. Now, Mr. Reporter the answer: "The Witness: I don't know."

The Witness: He asked me a question whether I changed my books, method of keeping books the first of the year, and I didn't know.

By Mr. LaTourette:

Q. You didn't know at the time of this hearing whether you had made any change?

A. That is correct.

Q. You are certain now that you did make a change?

A. I am certain now we didn't make a change until we were ordered to do so under the rulings of the Commission in the accounting system. When that came in there was very little change we had to make, because that is about the way we kept them.

Q. Now, do you recall your testimony on page 338 of the same record, where this question was propounded to you [fol. 604] by Mr. Yockey: "Q. (By Mr. Yockey) Have you made any change in the manner of keeping the records of Ziffrin Truck Lines, Incorporated since the 1st day of January, 1936?" Do you recall your answer being: "Yes, sir." to that question?

A. That is possible.

Q. And then, do you recall this question being propounded by Mr. Yockey: "Have you made the change? A. Yes, sir." "Q. What change have you made? A. We have made all of the changes to meet the Public Service Commission's recommendations that we knew." Do you remember that testimony?

A. Yes, sir.

Q. So it is a fact, is it not, then, that you did make changes in your bookkeeping in your business transactions after January 1, 1936?

Mr. Ellis: To which I object. The question is you and your, not relating to any company.

Exam. Lawton: Just confine it to one or the other.

By Mr. LaTourette:

Q. It is a fact then, is it not, as you testified, that there were changes made in the bookkeeping arrangement as between Ziffrin Truck Lines, Incorporated, and Ziffrin, Incorporated?

Mr. Ellis: I object to that. The testimony was not that. It was arranged as to Ziffrin Truck Lines only. Now, that is the testimony he read out of this record.

[fol. 605] Mr. LaTourette: I did not. The record will show.

Exam. Lawton: I suggest the incorporation of the pertinent portions either in the form of an exhibit so that we may have them in the record.

Mr. LaTourette: Very well.

Exam. Lawton: In case there is any question.

Mr. LaTourette: Off the record.

Exam. Lawton: Off the record.

(Discussion outside of the record.)

Mr. LaTourette: I will offer, Mr. Examiner, the exhibit, being a transcript of pages 335 to 338 inclusive of the record in the hearing of the application of Ziffrin Truck Lines, Incorporated, Docket MC 2510, and I will have copies made and passed to the Examiner and the reporter, and all parties in interest.

Mr. Ellis: Wait just a minute. I want to state, what is going in there, is this man that you are interrogating, Mr. Ziffrin, you included several pages. Obviously, it includes a lot of other material.

Mr. LaTourette: The other pages are purely argumentative, leading up to the final answer of the question by the witness.

Exam. Lawton: The only pertinent parts of the exhibit would be the questions and answer- that were brought out here on cross-examination.

[fol. 606] Mr. LaTourette: With reference to the books.

Mr. Ellis: If it is offered for the purpose of showing what Mr. Ziffrin testified to in the former proceedings about changes in any form in the books of either Ziffrin, Incorporated, or Ziffrin Truck Lines, we have no objection. If it includes extraneous and other matter, we think it should be deleted from the record.

Exam. Lawton: The extraneous matter will not be considered. Off the record.

(Discussion had outside the record.)

Mr. LaTourette: I would like to direct this question to Mr. Ellis, to Mr. Loughry, and to the Examiner. Might it be stipulated that there may be considered as part of the record in this case, pages 335 to 338, inclusive, of the record in the hearing of the application of Ziffrin Truck Lines, Incorporated, Docket MC 2510?

Mr. Ellis: Off the record a minute.

Exam. Lawton: Off the record.

(Discussion had outside of the record.)

Mr. LaTourette: May it be stipulated between counsel that in a hearing on the application of Ziffrin Truck Lines, Incorporated, Docket No. MC 2510, the following questions, and the following answers given as appear on the pages in the record which I will specifically set forth in connection with the questions and answers. On page 335 [fol. 607] of the record, a question by Mr. Yockey: "Q. Have you made any difference in the manner in which you keep the books of your corporation since the 1st day of January, 1936?" On page 337 Mr. Yockey states: "There is a question before the Examiner which was objected to." "Exam. Hill: The question was whether there had been any change."

Mr. Ellis: Before you go any further, I am going to object to the reading into this record, or any attempt to put in here the subject of argument between counsel, or any statement to rulings made by the Examiner.

Exam. Lawton: I don't think that is pertinent. I think all you need is questions and answers.

Mr. LaTourette: It leads up to the discussing of the date counsel directed his questioning.

Exam. Lawton: Off the record.

(Discussion outside of the record.)

Exam. Lawton: On the record.

Mr. LaTourette: Mr. Examiner, wouldn't it be better this way: I am going to ask leave to offer as an exhibit, copies of the pages 35 and 38, on the record.

Mr. Ellis: We are going to object.

Mr. LaTourette: If we can't get together on a stipulation.

Exam. Lawton: I don't see why you can't leave that in, Mr. Ellis. There is very little extraneous matter there [fol. 608] and it will not be considered.

Mr. LaTourette: Simply assist the Examiner to get the trend of the testimony.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

Mr. LaTourette: We shall start all over again. May it be stipulated between counsel and the parties that the following questions and answers appear on the respective pages of the record in Docket MC 2510, application of Ziffrin Truck Lines, Incorporated, common carrier: "Q. (By Mr. Yockey) Have you made any difference in the manner in which you keep the books of your corporation since the 1st day of January, 1936?" Page 337: "The Witness: I don't know. He asked me the question whether I changed my books, or the method of keeping books on the first of the year. I don't know." "Q. (By Mr. Yockey) I asked if you have changed the method of keeping your books since the 1st day of January of last year, in any way?" Page 338: "Q. (By Mr. Yockey) Have you made any change? A. Yes, sir. Q. What change have you made? A. We have made all of the changes to meet the Public Service Commission's recommendation that we knew."

Mr. LaTourette: All right.

Mr. Ellis: I have no objection to that whatever.

Exam. Lawton: You so stipulate, do you, Mr. Ellis?

[fol. 609] Mr. Ellis: Yes, sir.

Exam. Lawton: All right, proceed. Off the record.

(Discussion outside the record.)

Exam. Lawton: We will take a few minutes' recess at this time.

(A short recess was taken.)

Exam. Lawton: All right, you may resume, Mr. LaTourette.

By Mr. LaTourette:

Q. Mr. Ziffrin, do Ziffrin, Incorporated and Ziffrin Truck Lines, Incorporated, have their offices in the same building?

A. Yes.

Q. Do they have their terminal at the same address, both companies, I mean, in Indianapolis?

A. Yes; sir, sir.

Q. Does the same receiving clerk receive freight for both Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated?

A. No, sir.

Q. Well, is it possible that they do?

A. No, sir.

Q. Again referring to your testimony in the case of Ziffrin Truck Lines, Incorporated, I will ask you if you recall this question being propounded to you: "Q. (By Mr. LaTourette) This same receiving clerk, does this same, that uses the name of Ziffrin, Incorporated, and Ziffrin, [fol. 610] Truck Lines, Incorporated, interchangeably receive freight for both of the lines? The Witness: That is possible." Do you remember of testifying in that way in the hearing on the application of Ziffrin Truck Lines, Incorporated?

A. Yes.

Q. Do you remember this question being asked which appears at page 350 of the transcript: This question also appears on the same page: "Q. Do you have the same receiving clerk. A. It is possible at certain places. Q. (By Exam. Hill) Well, not possible. Now, do you know? Is it the fact? A. Well, it is a fact." Do you remember that testimony?

Mr. Ellis: I am going to object to asking him what Examiner Hill's comments were. If there are any questions and answers that he made, we haven't any objection to them.

Exam. Lawton: I think it was made in the form of a question.

By Mr. LaTourette:

Q. Do you remember that question?

A. Yes, I believe I do.

Q. Well, it is a fact, is it not, that the receiving clerk receives property for both Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated?

Mr. Ellis: I object to that. He said "No" to the same question just a moment ago.

Exam. Lawton: He may testify.

The Witness: The first answer that I have applies in [fol. 611] this case. It does not.

By Mr. LaTourette:

Q. So when you were under oath in the previous hearing in response particularly to that inquiry by Examiner Hill, you did not tell the truth?

A. I certainly did.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record. All right, you may answer or explain the apparent discrepancy, if that is what you intend to do.

The Witness: Certainly, that is the fact.

By Exam. Lawton:

Q. That was a fact at that time?

A. It was correct at that time. It is correct, as I answered it at this time.

Q. In other words, the situation has changed in the interim?

A. What he has referred to.

By Mr. LaTourette:

Q. As to the receiving clerk receiving freight for both companies, that situation was changed since the hearing of the application of the Ziffrin Truck Lines, Incorporated?

A. Mr. LaTourette, I think you started out by showing the condition here at Indianapolis. Isn't that so? You started it.

Q. I just read the record as it appears.

A. Your first question then could build upon what is [fol. 612] taking place at Indianapolis.

Exam. Lawton: Was the question directed to the practice here at Indianapolis, Mr. LaTourette? It was not clear in the manner in which you phrased it.

The Witness: I was not referring to the transcript. I was referring to your first question before you got on the transcript.

Mr. LaTourette: I don't remember what that was now, Mr. Ziffrin.

The Witness: I think you will have to, then——

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record.

Mr. LaTourette: I will have to introduce as exhibit, page 349 of the record in the hearing on the application of Ziffrin Truck Lines, Incorporated, and also MC 2510, being the testimony and statement of counsel preceding the questions and answer previously read into the record which the witness remembered having been asked and answers thereto having been made.

Mr. Ellis: I am going to object to anything except the questions and answers.

Exam. Lawton: Can you stipulate that part into the record?

Mr. LaTourette: I will, if counsel will.

[fol. 613] Mr. Ellis: I said I have no objection to your putting in what you asked him and what was answered. If you will try to put in all of the speeches I made, and you made, if I had been there, I will object.

Exam. Lawton: I think what you want are the questions to the witness and his answers. Isn't that correct?

Mr. LaTourette: Of course, the question in the Examiner's mind was as to whether this indicated a practice at Indianapolis, or some other point, and the question was propounded in connection with a specific document in a group of documents, and the or-gin and destination point is not indicated in the record.

Exam. Lawton: Then, if it is not indicated in the record, it would not be of any benefit to put in that part of the transcript, would it?

Mr. LaTourette: As to identifying the place at which the receiving clerk received the freight.

Exam. Lawton: It would not help.

Mr. LaTourette: No, I take it, it would not. We will let it rest there, Mr. Examiner.

By Mr. LaTourette:

Q. Mr. Ziffrin, do you sign as president, the reports made to the state of Indiana, respecting the officers and directors of both Ziffrin, Incorporated, and Ziffrin Truck Lines?

A. I don't know. I sign so many papers, I don't know [fol. 614] whether I signed as president. That is all I have been doing is signing, lately. Sometimes I get dizzy signing.

Mr. LaTourette: Mark this protestants' exhibit 7.

(Protestants' Exhibit No. 7 marked for identification.)

By Mr. LaTourette:

Q. Mr. Ziffrin, I hand you what has been identified as protestants' exhibit No. 7, and ask you if you recognize that as an order of the Indiana Public Service Commission, directed to Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated, with reference to the keeping of separate books and records on the part of both companies?

Mr. Ellis: I am going to object to statement of counsel, as to what it is. The only proper question to ask is what this document is. What this document is, and what it might be, in fact, is something else.

Mr. LaTourette: I asked if he recognized what it was. That is the same thing.

Exam. Lawton: That is a proper question.

By Exam. Lawton:

Q. What is your answer, Mr. Ziffrin; have you examined it?

A. This. This is a proceeding, or record of a proceeding instituted by the Public Service Commission, and has to do with some intrastate traffic, intrastate traffic.

By Mr. LaTourette:

Q. Do you recognize that as an order that was issued by the Indiana Commission, in the proceeding styled "Petition of New York Central Railroad, et al., against Ziffrin, [fol. 615] Incorporated, and Ziffrin Truck Lines, Incorporated, No. 12261"?

A. Yes.

Q. Approved February 7th, 1936?
A. Yes.
Q. Did you then comply with that order of the Indiana Commission?

Mr. Ellis: I am going to object.

By Mr. LaTourette:

Q. Did Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated, comply with the order of the Indiana Commission?
A. I would have to read that order.

Mr. Ellis: I am going to object to the question for the further reason that——

By Mr. LaTourette:

Q. You would know, wouldn't you, whether your company complied with the order?

Exam. Lawton: Off the record.

(Discussion outside the record.)

Mr. Ellis: I want to object to the question for the further reason, it is directed toward the document which is not yet in our judgment properly identified but which purports to be an order of this commission of Indiana Public Service Commission. If it is, it has to do with a complaint of certain railroad companies for the revocation of intrastate authority.

[fol. 616] Mr. LaTourette: We object to counsel saying what it purports to be.

Mr. Ellis: I am saying what it is because you said what it was not, Mr. LaTourette.

Mr. LaTourette: I asked him what he recognized.

Mr. Ellis: I think I have a right to make my objection.

Exam. Lawton: Proceed.

Mr. Ellis: I am objecting, if it is not clear in the record, for the reason that the question seeks to interrogate the witness about a demand which, if properly identified would be an order of the Public Service Commission of Indiana made in the case where certain railroad companies filed an application, or a petition with the Indiana Commission seeking the revocation of a certain intrastate authority held by certain trucking companies, Ziffrin, Incorporated,

and Ziffrin Truck Lines, Incorporated, and the order is an order refusing to revoke permits, and it is not a similar proceeding, because the question of investigating books and records of this company has nothing whatever to do with the Intrastate Commerce Commission.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

Mr. LaTourette: Mr. Examiner, the order will speak for itself.

[fol. 617] Exam. Lawton: I think it has been identified by the witness as an order respecting the two carriers. That will be received for what it is worth.

(Protestants' Exhibit 7, witness Ziffrin, received in evidence.)

By Mr. LaTourette:

Q. I believe I asked you the question, but I will repeat it again. That is, did you comply with this order of the Indiana Commission?

A. Yes, sir.

Mr. LaTourette: Now, Mr. Examiner, I am having prepared certain records of the Secretary of State's office, and was going to introduce them by direct testimony of the accredited officer of the state. It may be, I can't conclude my cross-examination right now.

Exam. Lawton: If those exhibits that you mentioned are in proper form, they can be put in later.

Mr. LaTourette: Yes, or we can,—I might introduce them all at the same time. It appears this is all the cross-examination I will have at this time unless the examination of other counsel might make further cross-examination necessary.

Mr. Ellis: It seems to me,—I am not seeking to foreclose Mr. LaTourette—that there ought to be some limitation on cross-examination. I want to get these proceedings over today. I don't know what you want to do.

[fol. 618] Exam. Lawton: Mr. Goodman, do you have any cross-examination?

Mr. Goodman: Yes.

By Mr. Goodman:

Q. Mr. Ziffrin, you say that Mr. Berger, is in New York?

A. That is his residence, in New York.

Q. Is he living there now, do you know?

A. I think he is.

Q. And when did you see him last?

A. I have not seen him for two years.

Q. You have not seen him in two years?

A. All I get from him is his signature on dividend checks.

Q. In other words, you have not seen him or spoke with him since then, and the only time you have seen his signature.

A. It has been about two years.

Q. It has been about two years?

A. Yes. My contact with him has been through his son. He is living here in the city.

Q. Through whom?

A. Through a son.

Q. Who is this son?

A. Israel Berger.

Q. Is he, or has he any relationship with any of your companies?

A. Not at all.

Q. He has no relationship at all?

[fol. 619] A. None at all.

Q. Did this Mr. Berger who is in New York, has he ever worked for you?

A. Never.

Q. Never did?

A. Never.

Q. Did his son ever work for you?

A. Never.

Q. Never did?

A. No.

Q. Do you know whether he is any relation to Mr. Jake Weiss?

A. I don't know.

Q. Isn't it a fact he is his brother-in-law?

A. I don't know.

Q. You don't know?

A. No, really, I don't know.

Q. When the transaction for the sale of this stock took place, it took place in his office, did it not?

A. It sure did.

Q. He was not introduced to you as any relative of Jake Weiss?

A. No.

Q. Did you ever have a man working for you by the name of Birger?

A. I did.

Q. Any relationship to the stockholder in this case?

[fol. 620] A. No, sir.

Q. Any relationship whatsoever?

A. I have a Birger working for me now. He spells his name B-i-r-g-e-r.

Q. How many shares of stock does Mr. Berger hold?

A. 100.

Q. He holds 100 shares?

A. Yes.

Q. Mr. Levi, you stated was another stockholder in this company, the applicant?

A. Yes.

Q. Is Mr. Levi working for your company, the applicant?

A. This is not a Mister that happens to be a stockholder.

Q. It is whom?

A. It is a Mrs.

Q. It is a Mrs. Levi?

A. Yes.

Q. Has she any relatives that work for your company?

A. Yes.

Q. Whom?

A. Her husband.

Q. Her husband works for your company?

A. Yes.

Q. In what capacity?

A. He is an accountant.

[fol. 621] Q. How long has he worked there as an accountant?

A. He has worked since we organized the corporation.

Q. He had not been there prior to that time?

A. No.

Mr. Ellis: How could he be there prior to the organization?

By Mr. Goodman:

Q. Or rather, was he with Ziffrin Truck Lines, Incorporated, the common carrier company, prior?

A. No, he was not.

Q. Is Mr. Levi any relative of yours?

A. Well, since I got there, he turned out to be my brother-in-law, through no fault of mine.

Q. In other words, Mrs. Levi is your sister?

A. That is correct.

Q. How many shares of stock does Mrs. Levi own in your company?

A. 15.

Q. She owns 15?

A. Yes.

Q. How many shares of stock do you own?

A. I got 495.

Q. How many shares of stock are there outstanding?

A. There is outstanding in the name of S. O. Berman, that is the name of the other stockholder.

Q. I did not ask you that question. I asked you how many [fol. 622] shares of stock are there outstanding in the company, Ziffrin, Incorporated?

A. We have 1,000 shares.

Q. There is a thousand shares outstanding?

A. Yes.

Q. How many shares of stock did Mr. Berman hold?

A. 390.

Q. 390?

A. Yes.

Q. Does Mr. Berman work for your company?

A. No, sir.

Q. Do you know where he is?

A. Yes, sir.

Q. Where?

A. Logansport, Indiana.

Q. Do you know what his occupation is there?

A. Yes, sir.

Q. What is it?

A. He is a publisher of the Farrow's Tribune, which is a newspaper published in Logansport. He has a string of sporting goods stores; he is a director in a bank, and I don't know what else.

Q. Mr. Ziffrin, when did you see Mr. Berman last?

A. Last Sunday.

Q. When did you see him prior to that time?

[fol. 623] A. It has been about a year.

Q. About a year?
A. Yes.
Q. And when did you hold the last meeting of the Board of Directors of Ziffrin, Incorporated?
A. Last Sunday?
Q. Last Sunday.
A. Yes.
Q. Of course, Mr. Berger was not there at the time?
A. No, sir.
Q. In fact you have not seen him at the Board of Director's meeting in two years, is that right?
A. That is right, longer than that.
Q. Directing your attention now to Ziffrin Truck Lines, Incorporated, the common carrier company, how many shares of stock did you hold in that company?
A. Well, I own 98 per cent.
Q. And the rest is divided up between the members of your family, you say?
A. Yes, sir.
Q. Do you have solicitors——

Mr. Ellis: I object to that. I will let him identify what company he is talking about.

By Mr. Goodman:

Q. Does Ziffrin, Incorporated, have solicitors?
[fol. 624] A. Ziffrin, Incorporated, no.
Q. They haven't any?
A. No.
Q. Do you do any soliciting for that company?
A. I don't do any soliciting.
Q. You don't do any?
A. No, not for Ziffrin, Incorporated.
Q. It has no solicitors?
A. No, sir.
Q. You have had to take part in the transaction of business for the Ziffrin, Incorporated, insofar as drawing up contracts?
A. 90 per cent of it.
Q. 90 per cent of it.
A. Yes.
Q. And do you ever speak to any companies that you transact business with for Ziffrin, Incorporated?
A. Yes, surely.

Q. I have not finished.
A. Oh, pardon me.
Q. I am sorry.

Mr. Goodman: Will you read that?

(Question read.)

By Mr. Goodman:

Q. For the purpose of getting business for Ziffrin Truck Lines, Incorporated?

Mr. Ellis: Wait a minute. To which we object. We ob-[fol. 625] ject because it is impossible to speak to a company. A company can only be addressed by a formal communication.

By Mr. Goodman:

Q. Will you kindly, then, change that to an officer of the company, rather than company.
A. Oh, I don't believe I want to answer that question. What I do when I talk to customers; I don't think that has any bearing.
Q. I only mean insofar as getting business for the common carrier, Mr. Ziffrin.

By Exam. Lawton:

Q. Do you contact your accounts?
A. Surely.
Q. With reference to the business?
A. Yes, occasionally.

By Mr. Goodman:

Q. Do you attempt to try to get business for the common carrier company?
A. Surely.
Q. You do, do you not?
A. Why, surely. Not only that, I try to get business for some other truck lines that I am interested in. If I can't get them for Ziffrin Truck Lines, I try to get it for the other truck lines.
Q. That you are interested in?
A. Surely.

By Mr. Ellis:

Q. You don't mean Ziffrin, Incorporated?

A. No, the other common carrier lines, I said.

[fol. 626] By Mr. Goodman:

Q. Now, directing your attention to Chicago, Illinois, you have an office there, have you not, a terminal?

A. Yes.

Mr. Ellis: I object to that unless he identifies which company he means.

By Mr. Goodman:

Q. Ziffrin, Incorporated.

A. Yes, sir.

Q. And you also have an office for Ziffrin Truck Lines, Incorporated, have you not?

A. Yes, sir.

Q. They both occupy the same office?

A. In the same building.

Q. In the same building?

A. Yes, sir.

Q. Now, is there a separate telephone number for Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated?

A. Well, we happen to have a switchboard there, that is for seven different truck lines. The members of all companies are on the same number, and when the switchboard operator gets the call she connects, she connects into the number or the company they are calling. The operator has one of those trunk lines.

Q. Are there separate office employes at Chicago?

A. Yes.

Q. For the Ziffrin Truck Line, Incorporated, and the [fol. 627] Ziffrin, Incorporated?

A. Yes.

Q. How many office employes have you for each?

A. I don't know.

Q. Are they used interchangeably?

A. Some of them are.

Q. Now, have you a bank account for Ziffrin Truck Lines, Incorporated, in Chicago?

Mr. Ellis: To which we object. Were either one of these corporations——

Mr. Goodman: I did not ask that.

Mr. Ellis: You asked him where he had his bank account.

Exam. Lawton: Off the record.

By Mr. Goodman:

Q. Have you a bank account in Chicago?

A. I have a bank account.

Mr. Ellis: Be still a minute, Sam.

Exam. Lawton: I know what you are getting at. If you can put that in a different form, it would be less objectionable.

By Mr. Goodman:

Q. Do you have separate bank accounts in Chicago for Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated?

Mr. Ellis: To which we object, because the bank in Chicago where the money of these companies, or of any company may be kept, in Chicago, New York, San Francisco or [fol. 628] London, is no concern of this gentleman or the Commission either one, so we view it.

Exam. Lawton: I think it goes to the separation of the operation; I will permit it.

The Witness: We do not have any bank account in Chicago at all for Ziffrin, Incorporated.

By Mr. Goodman:

Q. For Ziffrin, Incorporated?

A. No.

Q. You do for Ziffrin Truck Lines, Incorporated?

A. That is correct.

Q. Have you any employes or drivers in Chicago, Illinois?

Mr. Loughry: Whom do you mean?

By Mr. Goodman:

Q. For Ziffrin, Incorporated, the contract carrier, the applicant?

A. Yes.

Q. And they are paid from the Chicago office, are they not?

A. Yes, sir.

Q. They are paid on the checks of Ziffrin Truck Lines, Incorporated, are they not?

A. No, sir; they are paid out of a petty cash fund that they have up there for Ziffrin, Incorporated.

Q. You mean every time that your truck drivers are paid from Ziffrin, Incorporated, they are paid from a petty cash and not by check?

A. That is correct. I mean, not only the driver but every [fol. 629] employe that works for Ziffrin, Incorporated, in Chicago gets paid in cash, out of petty cash.

Q. Is that always true? Has it always been true, or is it true today?

A. That has been true for a considerable time.

Q. If one of the witnesses, one of the driver witnesses that was present and testified in the application of Ziffrin Truck Lines, Incorporated, Docket No. MC 2510, stated that he was paid by Ziffrin Truck Lines, Incorporated, the common carrier company, and also worked interchangeably for both companies, would you say he was wrong?

A. No, sir, I would not.

Q. Directing your attention to July 1, 1935, how many trucks were registered in the name of the applicant?

Mr. Ellis: I object to that, registered where and for what purpose?

By Mr. Goodman:

Q. Well, in whose name was the title; let me put it that way.

Exam. Lawton: What state are you referring to?

By Mr. Goodman:

Q. Well, for the title would apply to any state, would it not, Mr. Examiner? In other words, how many pieces of equipment did the applicant in this case have on July 1, 1935?

A. Oh, I would not know without checking my records.

Q. Would you know how many pieces of equipment it [fol. 630] held on June 1, 1935, or July 1, 1935, by the Ziffrin Truck Lines, Incorporated, the common carrier company?

A. No, not without checking.

Q. Would you say, Mr. Ziffrin, that most of your equipment was registered in the various states under both Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated?

A. I think we were neither one or the other. I don't understand your question. Repeat that again.

(Question read.)

The Witness: That is the only name they could be registered under.

By Mr. Godman:

Q. Yes, but are they though, Mr. Ziffrin?

A. They certainly are not registered under anything else.

Q. I don't know whether you really understand the question. I am merely asking you whether one truck is registered under both company's names?

A. Oh, yes. In the state of Indiana here we have trucks that are registered under three and four different names, the same trucks.

Q. Under three and four different companies that you are interested in?

A. Yes, sir.

Q. In other words, Ziffrin Truck Lines, Incorporated, and Ziffrin, Incorporated, the applicant in this case——

A. I would be glad to give you the record.

[fol. 631] Mr. Ellis: Just let him ask the questions.

By Mr. Goodman:

Q. Ziffrin Truck Lines, Incorporated. Strike that, please. We will start over again. In other words, Mr. Ziffrin, the trucks to which I refer to here being registered in the name of both companies are also registered in the names of other companies in which you control stock?

A. Yes, sir.

By Exam. Lawton:

Q. May I interpolate a question? In which state are the trucks titled at the time?

A. The majority of them would be in Indiana. There would be a few in Illinois.

Mr. Ellis: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record.

By Mr. Goodman:

Q. Now, a driver at your terminal in Indianapolis starts out in the morning, does he know whether he is going to work for Ziffrin Truck Lines, Incorporated, or Ziffrin, Incorporated?

A. Surely.

Q. He does?

A. Yes.

Q. Now, after hearing of MC 2510, application of Ziffrin Truck Lines, Incorporated held at Indianapolis, September, 1937, in October, 1937, were you present?

A. Yes, sir, part of the time.

[fol. 632] Q. If one of the witnesses in that particular case stated that when he started out in the morning he did not know whether he was going to work for Ziffrin Truck Lines, Incorporated, or Ziffrin, Incorporated, and he would not know until he received the billing, would you say that he was in error?

Mr. Ellis: Wait a minute. I am going to object to this method of cross-examination, of throwing out a paper here which looks like a transcript and interrogating this witness about the statement of other witnesses, which could not be binding on him in this proceeding, and making innuendoes in this record by way of questioning which may or may not be borne out by the record. Whatever is in there, if it is pertinent to any degree, all right. We are objecting to that procedure. I think it is wholly improper.

Exam. Lawton: Why don't you repeat the question and answer and ask him if that is true. That would be the proper method of getting it.

Mr. Goodman: If you are willing to stipulate the record of the common carrier application in the record of this case——

Mr. Ellis: Why, certainly not. It is in the possession of the Interstate Commerce Commission, and I assume regardless of what you or I will do, the Commission will give it such consideration and weight as they feel fit to do. They usually do, if that right, Mr. Examiner?

[fol. 633] Exam. Lawton: That is right.

Mr. Ellis: I think the reading of it into this record, just encumbers the record,

Exam. Lawton: Not only that but certain findings which were made have become the findings and order of the Commission of 2510.

Mr. Goodman: If both records are going to be read in conjunction with it for the purpose of determining the rights of the applicant as well as the consistency of public interest, I don't think it will be necessary for me to inquire into what had taken place at the common carrier hearing. So for that reason, I will cease cross-examination right now on any portion of the testimony.

Exam. Lawton: I would say that in view of the issues raised by the orders that all due and proper consideration will be given to the proceeding in MC 2510.

Mr. Ellis: Off the record.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

By Mr. Goodman:

Q. Mr. Ziffrin, you stated in your direct examination, that the contract company, that is the applicant in this case, and the common carrier company, Ziffrin Truck Lines, Incorporated, were separate and distinct companies?

A. Oh, positively.

[fol. 634] Q. That is borne out by the certificate of incorporation of the state.

Mr. Ellis: I object to that. It is not borne out by any one fact; it is borne out by a great mass of evidence which has been submitted here.

By Mr. Goodman:

Q. You also stated, Mr. Ziffrin, that the contract carrier company has no control over the common carrier company, and vice versa; is that correct?

A. That is true.

Q. In your meetings of the board of directors in the Ziffrin, Incorporated, you have in mind when discussing matters pertinent to the applicant corporation a situation

that may or may not develop in the common carrier company, do you not?

A. What I have in mind when I am at a board of directors meeting, I do not care to put on paper.

Q. I mean, I don't care to get any particular points, any point; I don't want to delve into any of your personal problems, but insofar as they may be of help to the Commission.

Mr. Ellis: I am going to object. I don't think it will help the Commission at this time. In this country it is legal for a man to be a member of the board of directors of many corporations. I happen to be a member of the board of directors of corporations myself. I suppose Mr. LaTourette is. We do not own any of the stock. They put us in for that purpose. Obviously, a man's mental processes are [fol. 635] not the subject of an inquiry of this kind. We think it is a matter which the Commission is as well informed on as anything else.

Exam. Lawton: Will you go back again to the question:

(Question read.)

Exam Lawton: I think the objection is well taken. That is too far afield, what is in the man's mind.

By Mr. Goodman:

Q. Mr. Ziffrin, assume that a whiskey company for whom you are now hauling as a common carrier, should ask you to give them a contract with the contract carrier company——

Mr. Ellis: I object, because "you" refers to Sam Ziffrin, personally.

Mr. Goodman: Yes, I am referring to him personally.

Mr. Ellis: He does not haul for anybody as a common carrier; Mr. Ziffrin is not a carrier.

Exam. Lawton: Let us stop the argument. Read the question.

(Question read.)

Exam. Lawton: You mean you?

By Mr. Goodman:

Q. You, as an officer of either one of these corporations should be approached by a shipper who is using your serv-

ice now as a common carrier, and he were to approach you and ask you whether or not you would enter into a contract with him with your contract carrier company to haul this same merchandise to the same destination point, what [fol. 636] would you do in such a circumstance?

A. Well, I would think a little bit, first.

Q. Without question.

A. And I think he would have a pretty hard time trying to get a contract if it was in the same territory.

Q. Would the fact that you own 98 per cent of the stock of the common carrier company, influence you?

A. I got to be more careful of my position in Ziffrin, Incorporated by reason of the fact that these other people are in there, that I can't inject into it, what may be a bad case of competitive influence there. There is competition between the two of them right now.

Q. It makes it very difficult?

A. Puts me sometimes in a bad spot.

Q. Mr. Ziffrin, in calling up these different distributing companies, and whiskey dealers, isn't it an advantage as far as the common carrier is concerned, to have the contract carrier company haul the merchandise between Louisville and points in Illinois and various other points that your common carrier lines run to, to have the contract carrier operate out of Lawrenceburg, Indiana, into these other various points?

A. I don't believe so. I can't offer any answer.

Q. What I am driving at, Mr. Ziffrin, is simply this: you have a contract with the distilleries, say, for an example, between Lawrenceburg, Indiana,——

[fol. 637] A. When you say "you" have a contract——

Q. Ziffrin, Incorporated, the contract carrier company, has a contract to operate between Lawrenceburg, Indiana, and Chicago, Illinois, and various other points. Now, is that any particular advantage to the common carrier company, Ziffrin Truck Lines, Incorporated, in operating out of Louisville, into these various other points? In other words, you control business by virtue of the fact——

A. No, it is not any advantage.

Q. It is not?

A. No. What has an advantage of a movement from Lawrenceburg to Chicago, got to do with a movement from Louisville to Chicago? I do not get your line of reasoning.

Q. In other words, you do not see my point at all?

A. No.

Q. Probably I can make it a little more clear. Haven't you gone to the distilleries in Kentucky and commanded their business via the common carrier company by virtue of the fact you entered into an agreement with it, to be a contract carrier out of Lawrenceburg and Louisville to Chicago?

A. Absolutely not.

Q. Isn't it a fact that you control all of the business out of Louisville for these distillery companies for whom you have two contracts?

A. No, I don't.

[fol. 638] Q. I am speaking of the common carrier business that comes out of Louisville?

A. I do not. I wish I did.

Q. Now, directing your attention to 1936, approximately in November, you had a rate on file with the common carrier company of 38 cents from Lawrenceburg to Chicago; isn't that right?

A. I don't know. I do not know what kind of rates there were in 1936. I defy anybody to tell me what common carrier rates are, even now, let alone 1936.

Q. Let me put this question to you: isn't it true in 1936, you had one rate between Lawrenceburg to Chicago for the common carrier company that was higher than your rate between Lawrenceburg and Chicago for your contract carrier company?

A. I don't know nothing about that.

Q. You would not know anything about that?

A. No. I will tell you what, since you are bringing up rates——

Q. No. I do not want anything that is not pertinent to the question.

A. This is coming right back to your question, and that is that you are talking about rates.

Q. I don't want to hear that now. I have too much to go over.

A. O. K. All right.

Q. Mr. Ziffrin, would you say that your tonnage increased [fol. 639] out of Louisville to points on your lines with the common carrier company, after your company, after the contract carrier company got contracts with the distillers?

A. No, sir.

Q. Your tonnage did not increase?
A. No, sir.
Q. Would you know if it did?
A. You bet you. I made a special investigation of that. I find it decreased.

By Exam. Lawton:

Q. How do you account for that?
A. I don't know. I guess, perhaps, from conditions.

By Mr. Goodman:

Q. That is probably because the shipment stopped moving on the common carrier line and went over to the contract carrier line?
A. No, sir. It reflected both ways.
Q. Do you know whether or not the charges on the freight hauled by the contract carrier company and particularly whiskey, is prepaid, or collect?

Mr. Ellis: Are you referring to the provisions of the provisions of the contract on file?
Exam. Lawton: No, he is referring to the paying of the charges.

By Mr. Goodman:

Q. I want to know how the freight is paid by the shipper or the consignee?
A. It all depends on the contract. If the contract calls [fol. 640] for the prepayment of freight by the shipper, or it might call for collection of freight by the consignee with whom the contract is made. The contract is always made with the fellow who pays the bill.
Q. Isn't it true that most all of these movements of whiskey that are moved now by the applicant in this case, are prepaid?
A. That is true.
Q. That is true, is it not?
A. Yes.
Q. There are very few routing orders that come from the consignee today as the result of the prepayment of the freight?
A. I do not know anything about what the customers send in. I do not know what they do.

Q. Did you ever have any conversation with any of these companies that there is a contract on file with regarding the fact that there are too many consignees request routing; therefore, if you can make arrangements with the shippers to prepay the freight, it will be an advantage to you?

A. I don't know any such instance like that.

Q. When a shipment of liquor moves from Lawrenceburg, Indiana, to Chicago, Illinois, via the common carrier company, does it go deadhead back?

A. Which shipment, which truck?

Q. In other words, assume a shipment of whiskey moving out of Lawrenceburg destined to Chicago, Illinois, and [fol. 641] the whiskey is unloaded at Chicago, Illinois?

A. Yes.

Q. Is that truck brought back empty there to Lawrenceburg, or Indianapolis?

A. We try not to bring it back empty. We try to load them back.

Q. What is it loaded back with?

A. It might be loaded back with freight from the Lawrenceburg Trucking Company, and might be loaded back with freight from the General Motor Express. It might be loaded back with freight from the Ziffrin Truck Lines, and might be sent up to Wisconsin.

Q. In other words, you can't tell me what the commodity on that return movement would be?

A. No. How can I tell what the commodity would be? It is liable to be any kind of commodity.

Q. You don't mean to imply that the common carrier, that the contract carrier trucks move out of Lawrenceburg to Chicago and never move back into Lawrenceburg, or to any other point on your line with any other commodity than whiskey, or whatever the commodity might be?

A. It might come back with anything from the other companies; it might have come back with a load of Ziffrin, Incorporated, or it might have come back with freight for the other companies. That is one of our operating,—efficient operating.

[fol. 642] Q. Has there ever been a time in the history of Ziffrin, Incorporated, the contract carrier, when a movement of whiskey to any point on your line, from any origin point would not be a full truckload?

A. Let me have that question again?

(Question read.)

The Witness: No, there never was a time. There are always full truckloads.

Q. There are always full truckloads?

A. Yes, sir.

Q. Isn't this statement true, Mr. Ziffrin, that at the time the Interstate Commerce Commission required contracts be written and on file with the Commission, that at the entry into each of these contracts, your rate was reduced from what it formerly had been?

A. No, sir, absolutely not.

Q. At the time you entered into an agreement with the Standard Nut Margarine Company, that is the actual written agreement, wasn't there a reduction of rates approximately to, Oh, 12 to 14 cents a hundred, from what it formerly had been?

A. No, sir. I would not permit anything like that, not with my eyes open.

Q. Was there an increase in tonnage moving from Lawrenceburg, Indiana, to Chicago, after 1936, via the contract carrier line, the applicant?

[fol. 643] A. Let us have that again.

Mr. Goodman: Read it.

(Question read.)

The Witness: Over when? An increase over what?

By Mr. Goodman:

Q. An increase?

A. Over 1935?

Q. Over either any month, or all of 1935, any way you want to consider it?

A. There is an increase in movement of liquor generally in the year 1936 over the year 1935.

Q. Wasn't there a substantial increase in your business about November, 1936, in the movement of whiskey over the contract carrier company?

A. 1936, as far as all of our companies were concerned, were the best years we have had.

Q. Now, referring back to your directors' meeting with the applicant in this case, does your sister, Mrs. Levi, appear?

A. Yes, sir.

Q. Does she come down to each and every meeting?

A. Yes, sir.
Q. And Mr. Berger does not?

Mr. Ellis: He has answered that he has not been there in sometime.
Mr. Goodman: For the last two years.

By Mr. Goodman:

Q. Have any complaints ever been made to you by the [fol. 644] stockholders of Ziffrin, Incorporated, because you control 98 per cent of the capital stock of the common carrier company?
A. Not for that reason, no, sir.
Q. Have any shippers for whom the Ziffrin Truck Line, Incorporated, the common carrier, now hauls, ever approached you to enter into a contract with them on behalf of the contract carrier company, the applicant?
A. Oh, yes.
Q. And the routes over which the contract carrier, the applicant here claims are practically identical as far as the origin and destination points, and the routes that are given by the Interstate Commerce Commission to the common carrier company, is that right?

Mr. Ellis: Wait a minute, to which we object, for the reason that the applicant in this case, the contract carrier, Ziffrin, Incorporated, is not claiming any routes whatsoever, but is claiming irregular service generally in the territory.

By Mr. Goodman:

Q. Let me put it this way, Mr. Ziffrin: the points of origin and the points of destination which the applicant here claims duplicate the points of origin and the points of destination that have been given to the common carrier company, Ziffrin Truck Lines, Incorporated, is that correct?
A. Just a small portion.
[fol. 645] Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.
Mr. Goodman: I will abandon that line of examination.

By Mr. Goodman:

Q. Did you hear Mr. Gilbert's testimony here yesterday? He was with Swift Packing Company?

A. I am sorry I did not. When he was on the stand, I was out in the hall smoking.

Q. The common carrier company had a contract with Swift & Company, even prior?

A. The common carrier company?

Q. The common carrier company had a contract?

A. No, sir. We never had a contract. Ziffrin Truck Lines, Incorporated, never had a contract.

Q. Isn't it a fact that Swift & Company require common carriers, as well as contract carriers to enter into agreement with them?

A. Yes. That was not a contract or had nothing to do with the rates. It was an insurance agreement.

Q. That was in effect with both companies, was it not?

A. Yes.

Q. In other words, the same type of contract you had?

A. That was no contract.

Q. Well, agreement, then?

A. Insurance agreement.

Q. Insurance agreement. Let us put it that way.

[fol. 646] A. That is right.

Q. Ziffrin Truck Line, Incorporated, the common carrier, has the same identical type of agreement that you mentioned. Let us strike that entire question. Ziffrin Truck Lines, Incorporated, and Ziffrin, Incorporated, both had the same type of agreement with Swift & Company, that you mentioned?

A. They had the same type of insurance agreement.

Q. That you mentioned, yes. They were not different in any respect?

A. Not a single comma or period.

Q. Mr. Ziffrin, Swift & Company, use both your common carrier company and your contract carrier company in the transportation of its commodities?

A. They did, and still do.

Q. They still do?

A. Yes, sir.

Q. Its origin point is mainly from Chicago, would you say that would be true?

A. Mainly, yes.

Q. At its destination points in the main, that is, for the bulk of the traffic, is where?

A. I don't know.

Q. Would you say in what state?

A. I would not venture.

Q. Would you say it was Indiana?

[fol. 647] A. I have in mind three states. I cannot bring myself around to which is the most.

Q. What three states have you in mind?

A. Well, Ohio and Kentucky. I am thinking of Louisville and Cincinnati, and Indiana. Now, we haul to Indianapolis. We haul to Louisville a lot. We haul to Cincinnati a lot.

Exam. Lawton: We will recess until 1:30.

(At 12:05 o'clock p. m., a recess was taken until 1:30.)

Afternoon Session, 1:30 o'clock p. m.

Exam. Lawton: Are you ready to proceed, gentlemen?

Mr. Ellis: We are, Mr. Examiner.

Exam. Lawton: Is there any further cross-examination of Mr. Ziffrin, Mr. Goodman?

Mr. Goodman: I am sorry; I did not hear you.

Exam. Lawton: Is there any further cross-examination of Mr. Ziffrin?

Mr. Goodman: Just one little thing.

SAM ZIFFRIN, resumed, previously sworn and testified further as follows:

Cross-examination.

By Mr. Goodman:

Q. Mr. Ziffrin, you prepared your application and document No. 2511, which is the present application. Did you examine it before it was signed?

A. I don't know whether I did or not.

[fol. 648] By Mr. Ellis:

Q. I did not hear what you said.

A. I don't remember whether I did or not.

By Mr. Goodman:

Q. Do you remember whether or not you put in your application any proof of operations?

A. Yes. Here is the way we handle it. You will notice the attorneys there, Weiss, Jacob Weiss, and we gave him all the documentary proof for both companies. On the last minute rush I took them myself to Washington. He segregated, was supposed to have segregated the different documentary evidence for both companies. I notice in one or two cases he sort of mixed them up a little bit.

Q. In other words, you are not relying upon the supporting data in your application?

A. Just as much as it concerns the application.

Q. Would you say then if there were any shipping orders or any documents here that bear the Ziffrin Truck Line, Incorporated, name, that it was purely put in here in error?

A. I would.

Mr. Goodman: That is all.

Exam. Lawton: You have some questions on redirect, Mr. Ellis?

Mr. Ellis: Yes.

Redirect examination.

By Mr. Ellis:

Q. Mr. Ziffrin, some questioning occurred this morning in connection with the cross-examination in relation to the [fol. 649] bank accounts of the applicant, Ziffrin, Incorporated, and Ziffrin Truck Lines, nIcorporated—do you recall that?

A. Yes, sir.

Q. I will ask you whether or not the applicant in this case, Ziffrin, Incorporated, has a separate bank account and keeps its funds in that account?

A. It has.

Q. Where is that account located?

A. Ziffrin, Incorporated, deals with two banks in the city of Indianapolis. One is the Union Trust Company, and the other is the Security Trust Company.

Q. Directing your attention to the common carrier, Ziffrin Truck Lines, Incorporated, does that company have a separate bank account and keeps its funds in it?

A. Yes, sir.

Q. Where is that account located?

A. That account is in the Merchants National Bank, Indianapolis, Indiana.

Q. There was some questioning by Mr. Goodman this morning, Mr. Ziffrin, relative to the arrangements that you had with Swift & Company on or about July 1, 1935. Do you recall that?

A. Yes, sir.

Q. I believe you testified that as far as the insurance agreement was concerned, that the applicant, Ziffrin, Incorporated, and the common carrier company, Ziffrin Truck [fol. 650] Lines, Incorporated, had the same papers and signed the same agreement with Swift & Company.

A. That is correct.

Q. I will ask you whether or not, however, if the applicant, Ziffrin, Incorporated, had a verbal contract with Swift & Company?

A. It did.

Q. Did Ziffrin Truck Lines, Incorporated, the common carrier, have any contract with Swift & Company?

A. No, sir.

Q. I want to direct your attention, Mr. Ziffrin, both to a portion of your testimony yesterday and a portion of your cross-examination this morning, and I refer specifically to the situation of Ziffrin, Incorporated, the applicant in this case, in the State of Kentucky. Do you recall your testimony of yesterday?

A. Yes, sir.

Q. I believe you testified yesterday that the State of Kentucky passed an act which forbade the alcoholic control commission from issuing a transporter's license to a common carrier. It would be only issued to qualified common carriers. Is that correct?

A. That is correct.

Q. I believe you further testified that you filed a complaint in the District Court and restrained the State of [fol. 651] Kentucky from interfering with the operation of Ziffrin, Incorporated, in the transportation of liquor.

A. That is correct.

Q. This morning one of the counsel for protestants identified some sort of a document emanating from the Division of Motor Transportation of the State of Kentucky, stating that you had in the name of Ziffrin, Incorporated, the appli-

cant in this case, applied to become a common carrier? Do you recall that?

A. Yes, sir.

Q. I will ask you whether or not if upon advice of your counsel in Kentucky immediately prior to filing this injunction suit in the United States District Court for the Eastern District of Kentucky, you filed an application with the Kentucky department of Motor Transportation to have it determine the status of Ziffrin, Incorporated, as to whether it was or was not a common or contract carrier?

A. That is correct.

Q. Was there a hearing before that department in the city of Frankfort, Kentucky?

A. There was.

Q. Did you appear and testify at that hearing?

A. I did.

Q. Did you testify at that time that Ziffrin, Incorporated, was a contract carrier?

A. Yes, sir.

[fol. 652] Q. I will ask you whether or not following that hearing the department of the State of Kentucky issued an order? Did they issue an order?

A. They did.

Mr. Ellis: Mark this Exhibit 8, will you please?

(Applicant's Exhibit 8 identified.)

By Mr. Ellis:

Q. I will hand you a paper which for the purpose of identification has been marked Exhibit No. 8, and ask you just what that is?

A. That is a decision of the Division of Motor Transportation of the State of Kentucky.

Q. In the case of the applicant?

A. In the case of Ziffrin, Incorporated.

Exam. Lawton: Let me ask you:

By Exam. Lawton:

Q. May I ask, did you see the copy of that, Mr. Ziffrin?

A. I did.

Q. Your company?

A. Yes.

Mr. Ellis: Off the record, please, Mr. Reporter.
Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

By Mr. Ellis:

Q. Just a minute, Mr. Ziffrin.

Mr. Ellis: With the identification of this exhibit I have [fol. 653] no further rebuttal from Mr. Ziffrin at this time.
Mr. Brunow: I have a few questions I would like to ask Mr. Ziffrin.
Exam. Lawton: All right.

Recross-examination.

By Mr. Brunow:

Q. Mr. Ziffrin, how many trucks does Ziffrin Truck Lines, Incorporated, own?
A. I don't know. I don't know without looking up our records.
Q. Do you mean to tell me that you as president of Ziffrin Truck Lines, Incorporated, don't know how many trucks that company owns?
A. Without looking up the records, that is just exactly what I mean.
Q. Well, how many trucks did they own the last time you checked?
A. I don't remember.
Q. Aren't you at all concerned with how many trucks you own? Don't you care?
A. Well, my concern ~~is that~~ I wish I didn't own as many as I do.
Q. You are not answering my question.
A. What is the question?
Q. Isn't it any concern of yours how many trucks or pieces of equipment Ziffrin Truck Lines, Incorporated, owns?
A. Yes, it is a concern. Sure, it is a concern.
Q. Then, do you make it your business, as part of your [fol. 654] duties as president of the company, to know how how many pieces of equipment the company has?

A. At times, whenever the occasion requires concern.

Q. How many pieces of equipment did Ziffrin Truck Lines, Incorporated, the last time that you had occasion to find out?

A. I don't remember.

Q. How many trucks does Ziffrin Truck Lines, Incorporated, own?

A. I don't know without consulting our records.

Exam. Lawton: Please talk a little louder.

The Witness: I don't know without consulting our records.

By Mr. Brunow:

Q. Does Ziffrin Truck Lines, Incorporated, operate any trucks under lease or as hired equipment?

A. They do.

Q. Does Ziffrin Truck Lines, Incorporated, operate more trucks under lease than they own?

A. Yes, I believe they do.

Q. Does Ziffrin, Incorporated, operate any trucks under lease?

A. They do.

Q. Do they operate more trucks under lease than they own?

A. Yes, they do.

Q. How many trucks are operating for Ziffrin, Incorporated, at the present time?

A. Well, at the present time I believe we have in operation, I know of 35 that is in operation in one town today. [fol. 655] I imagine we probably have about fifty in operation today.

Q. Do you mean to say, then, that the practice, that the number that you might have operating for Ziffrin, Incorporated, would fluctuate with the demands of the traffic?

A. That is correct.

Q. In other words, you would go out and hire them when you need them and release them when you finish?

A. No, we do not release them.

Q. You do not release them when you do not use them?

A. That is correct.

Mr. Ellis: I am going to object to that. It is obvious if there is no business he would not send an empty truck up and down the highway.

Exam. Lawton: I don't think we need try in this case the question of what constitutes a lease. That is not certainly the issue that is being considered or being determined by the Commission in the impending case. If that is what counsel is getting at, I think you should curtail that line of examination.

By Cr. Brunow:

Q. Are all of the employes, Mr. Ziffrin, of the two companies, that is, Ziffrin, Incorporated, the contract carrier, and Ziffrin Truck Lines, Incorporated, the common carrier, on the payroll of either one company or the other?

A. Yes, they would have to be.

Q. There are no employes, then, who are on the payroll [fol. 656] of both companies at the same time?

A. No.

Q. Is it true, then, Mr. Ziffrin, that the employees who are on the payroll and paid by Ziffrin Truck Lines, Incorporated, and might be performing duties when they have time, as you intimated and stated in your previous testimony in this hearing, for Ziffrin, Incorporated, are actually performing duties for Ziffrin, Incorporated, for which Ziffrin, Incorporated, is not paying them?

A. No, that is not true.

Q. Didn't you just state that all employees are either on the payroll of Ziffrin Truck Lines, Incorporated, or on the payroll of Ziffrin, Incorporated, and didn't you also say that those employees are not on the payrolls of both companies?

A. That is right. They are only on one payroll.

Q. Then, didn't you also state in your earlier testimony in this hearing, that there are employes who work in both companies and perform service for both companies?

A. That is right.

Q. Then, if they are being paid by one company, aren't they performing service for the other company?

A. They are.

Q. And not being paid by that company for those services?

A. You are talking about the payroll and you are mixing that with the question of payment. We only have them [fol. 657] on one payroll, but when they work for one company the other company charges it for that work. They

are on one payroll, although separate companies are charged.

Q. Then, your records and corporate accounts do reflect the charges and payments for the actual work the employes do for those respective companies?

A. Absolutely.

Q. Do your social security records reflect the same?

A. Absolutely. I have here a social security receipt with me in my file from both companies.

Q. Mr. Ziffrin, if you operate a truck hauling a truckload of whiskey, let us say, from Lawrenceburg, Indiana, to Chicago, as a contract carrier, that is by Ziffrin, Incorporated, and then this same truck returns from Chicago to, let us say, Cincinnati, with freight for Ziffrin Truck Lines, Incorporated, and that freight consists of miscellaneous shipments in the large, I mean the L. T. L. shipments?

A. It might.

Q. It might be L. T. L. or T. L.?

A. That is true.

Q. You do under circumstances use the same piece of equipment to haul for Ziffrin Truck Lines, Incorporated?

A. We do.

Mr. Brunow: I think that is all.

By Mr. Ellis:

Q. Ziffrin Truck Lines, Incorporated, pays for it, don't [fol. 658] they?

A. They sure do.

By Exam. Lawton:

Q. As I understand, Mr. Ziffrin, if a truck of the applicant came from Louisville to Chicago with a load of liquor, the same truck might take a load back in the reverse direction for Ziffrin Truck Lines, Incorporated?

A. Yes, sir.

By Mr. Brunow:

Q. May I ask another question? You will use that same piece of equipment hauling in one direction as a contract carrier, and—in a one-way haul, and return as a common carrier, is that correct?

Mr. Ellis: I object to that. He says "you will use".
Mr. Brunow: I mean Ziffrin, Incorporated. Excuse me.

The Witness: When Ziffrin, Incorporated,—this happens day in and day out—Ziffrin, Incorporated, using the same points that you made reference to, would take a load, a solid load of liquor from Lawrenceburg to Chicago. When that load was delivered in Chicago it is possible and it happens, and it is the same way it is done, that job is done. Now, if Ziffrin, Incorporated, does not have freight for that particular truck to come back with, and any one of the companies in our terminal might have, that same truck would truck back freight for the other respective companies that might use that truck. In other words, the companies over there avail themselves of what equipment they can [fol. 659] avail themselves of, if equipment is available.

By Exam. Lawton:

Q. Would the same driver and whatever other employe accompanied the truck, when they also truck it back on the return haul?

A. That happens, too.

Q. Even though their return haul was for the common carrier company?

A. Or it might be one or two of the other common carriers in the terminal.

Q. I understood that some of your vehicles have painted on the sides the name of both companies, is that right?

A. Yes, and other companies.

Q. Was that true in July, 1935?

A. Yes, sir.

Q. Do any of your vehicles at the present time have painted on the sides the name of any contract shipper?

A. No, sir.

Q. Did any of the vehicles around or on the grandfather date in 1935, have the names of any contract shippers painted on the sides?

A. When you say the contract shipper, do you mean the people with whom we have contracts?

Q. I am speaking of the applicant in this case, whether they had their own name on the trucks, whether you would have on your own truck the name of the contract shipper [fol. 660] at any time, any of these contract shippers that have been mentioned in this proceeding.

A. You mean with whom we have contracts?

Q. Yes.

A. No, none of ours have the name of any contract shipper.

Q. Or had their names?

A. No, sir, at no time.

Q. I understand your testimony to be, that on or about June 1, or July 1, 1935, you were then president of both companies?

A. Yes, sir.

Q. And did you then control the majority of the stock of the two companies?

A. Yes.

Q. Now, this is rather a pointed question. I am only asking it for the purpose of the record. If counsel thinks it is prejudicial you can object to it. I am simply trying to make the record here. It may have been brought out. It is not clear to me. When you contacted your customers, whether customers of the common carrier or contract carrier company, did you ever endeavor to secure traffic for one in preference to the other?

A. No, sir.

Q. If you had a shipper who was giving you a considable volume of traffic by your common carrier line, did you ever hold out to such shipper the promise of possibly [fol. 661] better service by the contract carrier provided you could make an arrangement with him?

A. No, sir.

Exam. Lawton: That is all the questions I have.

Redirect examination.

By Mr. Ellis:

Q. Mr. Ziffrin, in reference to the use of Ziffrin, Incorporated, trucks by some other company, Ziffrin Truck Lines, as it sometimes happens, some other company, not specifically mentioning the name, when there is no freight moving from a point where Ziffrin, Incorporated, truck is located, state whether or not Ziffrin, Incorporated, has paid a lease rental for the use of that truck?

A. It has.

Q. Do your books so reflect in all instances?

A. Yes, sir.

Q. If, as you state, sometimes happens, the service of a driver are included, is Ziffrin, Incorporated, reimbursed for the actual time which that driver might spend in that work?

A. Absolutely.

Q. There has been some questioning, and it developed the fact, that there are names of several different companies, including Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated, painted on some of these trucks. That is correct, isn't it?

A. Yes.

Q. I will ask you whether or not that is to comply with [fol. 662] the regulations of the Public Service Commission of the State of Indiana which require that the name of any company or carrier which may use the vehicle, be painted thereon?

A. That is why it is on there.

Q. In all instances, is it part of the requirements of those separate companies to pay Ziffrin, Incorporated, a separate and distinct fee of $24 a year for the use of that vehicle over the highways?

A. That is correct. In other words, when you see two names on one truck, that truck is registered two times in the State of Indiana. That is the requirement.

Q. One other question along that line: You testified here that you have been in the trucking business a number of years. I will ask you particularly whether or not in Indiana and this territory you are familiar with the operations of some other trucking companies besides yours with which you are affiliated?

A. I think I am.

Q. I will ask you whether or not it is a fact to your knowledge in numerous other instances a conveyance so used by two or more companies have the names painted thereon in compliance with the Indiana regulations and pay separate registrations in Indiana?

Mr. Brunow: We object to the general nature of the question, and the further fact that this witness is not qualified.

Mr. Ellis: He certainly is qualified.

[fol. 663] By Mr. Ellis:

Q. Answer.

A. Definitely so. Just here a few days ago——.

A. You mean with whom we have contracts?

Q. Yes.

A. No, none of ours have the name of any contract shipper.

Q. Or had their names?

A. No, sir, at no time.

Q. I understand your testimony to be, that on or about June 1, or July 1, 1935, you were then president of both companies?

A. Yes, sir.

Q. And did you then control the majority of the stock of the two companies?

A. Yes.

Q. Now, this is rather a pointed question. I am only asking it for the purpose of the record. If counsel thinks it is prejudicial you can object to it. I am simply trying to make the record here. It may have been brought out. It is not clear to me. When you contacted your customers, whether customers of the common carrier or contract carrier company, did you ever endeavor to secure traffic for one in preference to the other?

A. No, sir.

Q. If you had a shipper who was giving you a considable volume of traffic by your common carrier line, did you ever hold out to such shipper the promise of possibly [fol. 661] better service by the contract carrier provided you could make an arrangement with him?

A. No, sir.

Exam. Lawton: That is all the questions I have.

Redirect examination.

By Mr. Ellis:

Q. Mr. Ziffrin, in reference to the use of Ziffrin, Incorporated, trucks by some other company, Ziffrin Truck Lines, as it sometimes happens, some other company, not specifically mentioning the name, when there is no freight moving from a point where Ziffrin, Incorporated, truck is located, state whether or not Ziffrin, Incorporated, has paid a lease rental for the use of that truck?

A. It has.

Q. Do your books so reflect in all instances?

A. Yes, sir.

Q. If, as you state, sometimes happens, the service of a driver are included, is Ziffrin, Incorporated, reimbursed for the actual time which that driver might spend in that work?

A. Absolutely.

Q. There has been some questioning, and it developed the fact, that there are names of several different companies, including Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated, painted on some of these trucks. That is correct, isn't it?

A. Yes.

Q. I will ask you whether or not that is to comply with [fol. 662] the regulations of the Public Service Commission of the State of Indiana which require that the name of any company or carrier which may use the vehicle, be painted thereon?

A. That is why it is on there.

Q. In all instances, is it part of the requirements of those separate companies to pay Ziffrin, Incorporated, a separate and distinct fee of $24 a year for the use of that vehicle over the highways?

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Q. One other question along that line: You testified here that you have been in the trucking business a number of years. I will ask you particularly whether or not in Indiana and this territory you are familiar with the operations of some other trucking companies besides yours with which you are affiliated?

A. I think I am.

Q. I will ask you whether or not it is a fact to your knowledge in numerous other instances a conveyance so used by two or more companies have the names painted thereon in compliance with the Indiana regulations and pay separate registrations in Indiana?

Mr. Brunow: We object to the general nature of the question, and the further fact that this witness is not qualified.

Mr. Ellis: He certainly is qualified.

[fol. 663] By Mr. Ellis:

Q. Answer.

A. Definitely so. Just here a few days ago——

Q. You say definitely so?

A. Yes.

Q. One other question. According to your knowledge the way the trucking business is conducted in this territory, is the interchange or use of trucks which you have described between Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated, and some other companies, peculiar to those companies, or is it a common practice in this territory?

A. That is a regular practice in this territory.

Mr. Ellis: That is all of Mr. Ziffrin we want.

By Exam. Lawton:

Q. Just one further question. Do I understand that at times the same employe might work for the applicant company, Ziffrin, Incorporated, say in the forenoon, and then work in the service of the common carrier company in the afternoon?

A. That happens at times. You asked at the terminal. The terminal, which we call the terminal dispatch, those employes work for everybody in the terminal.

Exam. Lawton: Are there any further questions?

By Mr. Ellis:

Q. On that point, Mr. Ziffrin, in some of the points where you have Ziffrin, Incorporated, or Ziffrin Truck Lines, Incorporated, have companies operating, do you have terminals?

[fol. 664] A. Yes, sir.

Q. Do you when you have the space and when you can find somebody sometimes permit other trucking companies to use the same terminal?

A. Yes, sir.

Q. Is there anything peculiar or unusual about that in the trucking business?

A. Not at all.

Q. Are there terminals in the city of Indianapolis, to your personal knowledge, that house fifteen or twenty truck lines, including a number of the protestants in this case?

A. That is true.

Mr. Brunow: May I ask one or two questions?

Exam. Lawton: Well, yes.

By Mr. Brunow:

Q. Mr. Ziffrin, in your capacity as president of Ziffrin Truck Lines, Incorporated, and also as president of Ziffrin, Incorporated, isn't it a fact that you have the situation existing by which you can take this piece of equipment that we were talking about a while ago, from Lawrenceburg to Chicago, on a contract cartage basis, and return it, if necessary, on a common carrier basis, to offer Ziffrin, Incorporated, above and over what it would be if you were not in a position to return that truck upon a common carrier basis?

A. Well, it is only natural that we would give first choice [fol. 665] of the equipment to anybody that was tenants of that particular truck. In other words, when you fellows call for a truck we will give you a truck, if we have not got work for our own truck.

Q. Doesn't that in many cases keep you from operating empty in one direction?

A. Certainly. It works out to the advantage of all companies. If it would not be for that, we would have twice as many trucks on the highway and lose twice as much money.

By Mr. Goodman:

Q. I have just a question or two, since the question of leases has been brought out by Mr. Ellis. Mr. Ziffrin, when Ziffrin, Incorporated, the contract carrier, leases a truck to Ziffrin Truck Lines, Incorporated, the common carrier, is there any written lease made?

A. Yes, sir.

Q. There is a written lease each time?

A. There is a standing lease in effect, and agreement, signed by all companies that uses this equipment at all times, and the Interstate Commerce Commission has a copy of that lease.

Q. In other words, it can be used interchangeably in that one lease, isn't that true?

A. I would like to put in the record that Mr. Gaunt of the Interstate Commerce Commission has a copy of that lease.

Q. Who decides upon the revenue to be given for the use of the truck under the lease?

[fol. 666] A. That is all stipulated in the lease.

Q. You mean, it is an agreement between the two companies?

A. It is an agreement between several companies.

Q. Who negotiated the agreement?

A. The respective companies.

Q. What members of these companies got together, say, when they decided upon this particular lease situation?

Mr. Ellis: I am going to object. What difference does it make what representatives of the company entered into the contract?

Exam. Lawton: Objection sustained.

Mr. Goodman: O. K. That is all.

By Mr. Ellis:

Q. Just one other question, Mr. Ziffrin. You are acquainted with the Silver Fleet Company, a protestant in this case?

A. I am.

Q. I will ask you whether or not there have been occasions when you have let them use your equipment at their request?

A. Yes.

Mr. Ellis: That is all.

Exam. Lawton: Are you through with the re-direct examination?

Mr. Ellis: Yes, sir.

(Witness excused.)

Exam. Lawton: Does that represent the applicant's case? [fol. 667] Mr. Ellis: Yes, sir.

Exam. Lawton: Now, gentlemen, how about the matter of presenting the documentary evidence?

Mr. LaTourette: Mr. Examiner, before you get to that point, there may be about fifteen or twenty minutes required to put on some testimony of the protestants.

Exam. Lawton: I do not want to foreclose them. I just want to indicate that the applicant in completing its case, that we could arrive at an understanding on that point. Then the protestants can go ahead with their case. Do you want a recess, gentlemen?

Mr. LaTourette: No. I think we are ready, to talk about that now.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record. Make your offer, Mr. Ellis.

Mr. Ellis: On behalf of the applicant in this case, Ziffrin, Incorporated, I wish to state for the record that we offer to prepare as speedily as possible and would like at least thirty days time therefor, a digest or a summary showing typical operations of the applicant in this territory in support of the grandfather clause rights. The digest will be supported by original records of the applicant. Those original records will not be made available generally in [fol. 668] public hearing nor to representatives of counsel for protestants generally. They will at all times be available to the Commission upon its call and delivered to the custody of the Commission, if it is so desired. However, we at this time offer and suggest that if a commitee of licensed registered practitioners of the Interstate Commerce Commission, including Mr. LaTourette and Mr. Goodman, who agree to act for the protestants, and would further agree as practitioners, as I know they would, to respect the confidential relationship between the shipper and the applicant, to make these original records available to those two gentlemen for checking at any reasonable time and place, upon their completion.

Exam. Lawton: And upon their certifying as to the result of their check which also should be certified by applicant's counsel, I take it, that you are going to meet together when you make the check?

Mr. Ellis: Yes, sir.

Exam. Lawton: That digest, if it contains this information, as follows: The origin and destination of the shipments, the date, the commodity, and any notations indicating interchange with other carriers, and the name of the carrier, whether that of the applicant in this proceeding, or some other carrier. Now, do I hear any objection to that procedure and to the receipt of that digest so certified following within a reasonable time after the close of this hearing?

[fol. 669] Mr. LaTourette: May I inquire if it was the intention of the Examiner in addition to the information the abstract should contain, that it should make reference to the freight bill, the number of the applicant, the weight of the shipment?

Exam. Lawton: That will be necessary to check it. Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record. You understand the pro numbers will appear on the digest for the purpose of checking the shipping documents. If there are no pro numbers, the digest will so indicate.

Mr. LaTourette: How about the weight of the shipment?

Exam. Lawton: I think the weight of the shipment, the origin, destination, commodity, weight, and any notation relating to another carrier, and the name of the carrier transporting it, or apparently transporting the shipment, whether this applicant or Ziffrin Truck Lines, Incorporated, or Ziffrin, Incorporated. It seems to me that that digest should also indicate whether a bill is matched with a receipt or not.

Mr. LaTourette: A bill of lading?

Exam. Lawton: That is right. How long would it take you to prepare such a digest?

Mr. Ellis: I suggested thirty days.

Exam. Lawton: Do I hear any objection to that procedure, to the receipt of that digest containing the information [fol. 670] I have requested, certified to by counsel for applicant, and by Mr. Goodman and Mr. LaTourette for protestants?

Mr. Thomas: As I understand, the digest is not to contain the name of the shipper nor the consignee?

Exam. Lawton: That is right.

Mr. Thomas: Could I be served with a copy of that digest?

Exam. Lawton: All parties of record in this hearing will be served with a copy of that digest.

Mr. Thomas: All right.

Exam. Lawton: Hearing no objection, that offering is accepted, and that digest is to be sent to the Commission within thirty days from the close of this hearing. The Examiner understands that applicant has completed its direct examination.

Mr. Ellis: That is right, Mr. Examiner.

Exam. Lawton: I just want to put this question to applicant's counsel, not suggesting anything, but in the event that a careful study of the record in this case would indicate and the Commission would find that on the grandfather clause the applicant's operations may perhaps have been

those of a common carrier under the Motor Carrier Act and that subsequently thereto and some time long prior to this hearing they have been changed to conform to the requirements of the contract carrier under the Act, does applicant's counsel feel if that situation was found to exist, you have sufficiently established consistency with public interest?

[fol. 671] Mr. Ellis: As to that, Mr. Examiner, consistency with public interest is a matter which covers a lot of territory. I have discussed it informally with a lot of other counsel in various cases. We have all of us been of the opinion that it is a good deal more of an ephemeral thing than public convenience and necessity is in a common carrier case. The only matter in addition to the evidence which we have submitted as a record for the public interest, which I feel should be in this record, did not get into the record because of the fact that when we had these distiller witnesses here and other shipper witnesses, we were attempting in that first instance to limit the matter to one phase of the proceeding. I had in my notes one or two questions which I proposed to direct to them and which I started to direct to them and there was an objection; I was going to put this question whether or not they wanted to have the service continued, and what would be *to* extent of injury to their business if the service was discontinued, and so forth. I am not speaking at all of the expression of criticism of counsel on the other side, or of the Examiner, but I felt at the time when on cross-examination they did get into both phases, that I was just a little bit foreclosed on that. You understand, I don't mean the expression of criticism. Other than that, we feel the record does show consistency with the public interest, as we see it. Of course, everything I am saying, I want it distinctly understood as [fol. 672] not at all subscribing to any thought that this record shows that the applicant at any time was anything other than a contract carrier, because the record shows absolutely that at no time——

Exam. Lawton: That is a good point to argue on brief.

Mr. Ellis: Yes.

Exam. Lawton: I assume you will give us a brief on this matter?

Mr. Ellis: That is my position, other than those matters.

Exam. Lawton: I just want the impression that you feel satisfied to rest on your testimony. I think there was some testimony that might be taken as relating to the consistency of public interest, and I want to remind counsel for the applicant that the form of the procedure following it in the separation of the issues was at your suggestion.

Mr. Ellis: I understand that.

Exam. Lawton: Letting those important witnesses get away you can't blame the Examiner.

Mr. LaTourette: I was just going to make the observation that counsel for protestants were asked if the witnesses might be excused. It was at the request of Mr. Ellis that they were excused.

Mr. Ellis: I am not blaming you, Mr. LaTourette.

Exam. Lawton: Protestants may proceed.

Mr. LaTourette: Mr. Examiner, I have to go across the [fol. 673] hall and get a few records.

Exam. Lawton. We will take a few minutes recess. All exhibits that have been identified will be received into the record.

(Applicant's Exhibits Nos. 1, 5 and 8, Witness Ziffrin, and Protestants' Exhibit 6, Witness Ziffrin, received in evidence.)

Mr. LaTourette: I will call Mr. Keating.

Robert Keating was sworn and testified as follows:

Direct examination.

By Mr. LaTourette:

Q. Give the reporter your name and your occupation.

A. My name is Robert Keating; file clerk in the corporation department in the office of the Secretary of State of the State of Indiana.

Q. Is your residence in Indianapolis, Mr. Keating?

A. Yes, sir.

Q. Have you brought with you to the hearing room the original record from the Secretary of State's office in the form of annual domestic corporation reports for the years 1935, 1936, 1937 and 1938 of Ziffrin, Incorporated, and Ziffrin Truck Lines, Incorporated?

A. Yes.

Q. Will you turn, please, to the file of Ziffrin, Incorpo-
[fol. 674] rated, and state for the record the names reported to the Secretary of State of the directors of Ziffrin, Incorporated, for 1935, stating if the blank is blank, and does not contain any reference to names?

A. The report is blank as to the listing of directors.

Q. Will you refer to the same report and state the names of the officers of Ziffrin, Incorporated, as contained in the report?

A. President, Sam Ziffrin; secretary and treasurer, Sam Berman; assistant treasurer, Louis Levy.

Q. Will you refer to the same type of report made by Ziffrin, Incorporated, for the year 1936 and give the names of the directors and officers of that corporation as reported to the Secretary of State?

A. The president was S. Ziffrin; secretary and treasurer, S. Berman; there is another name listed as an officer, R. Berger.

Q. Is there any title shown?

A. No.

Q. In connection with Mr. Berger's name?

A. No.

Q. Will you give us the names of the directors as reported for the year 1936?

A. The directors were the same as the officers.

Q. The directors, then, I understand they are shown and reported as S. Ziffrin; S. Berman and R. Berger?

A. That is correct.

[fol. 675] Q. Will you refer to the report for 1937 made by Ziffrin, Incorporated, to the Secretary of State, and give the names of the directors and officers?

A. The president, S. Ziffrin; Secretary, S. Berman; treasurer E. Ziffrin; directors, the same.

Q. The directors are reported, are they, as S. Ziffrin, S. Berman and E. Ziffrin?

A. That is right.

Q. Now, for the year 1938?

A. President, S. Ziffrin; secretary and treasurer, S. Berman; assistant treasurer, Lewis Levy; directors the same as the officers.

Q. The directors being S. Ziffrin, S. Berman and Lewis Levy?

A. That is right.

Q. Now, will you refer to the annual report rendered by domestic corporations as filed in the office of the Secretary of State under the name of Ziffrin Truck Lines, Incorporated?

Mr. Ellis: Just a minute. Will you excuse me? As I understand, you would have the witness say the directors include Levy as reported?

Mr. LaTourette: I asked him what was on the report, Mr. Ellis, in 1938.

Mr. Ellis: He said the directors were the same. Then, in answer to another question you said Levy was a director.

Mr. LaTourette: Let us get straight. What year are you [fol. 676] referring to?

Mr. Ellis: '38.

Exam. Lawton: Get back to your 1938 report.

By Mr. LaTourette:

Q. Take the 1938 report of Ziffrin, Incorporated, and begin and give us the names of the directors and officers reported to the Secretary of State.

A. It lists the officers as president, S. Ziffrin; secretary and treasurer, S. Berman; assistant treasurer, Lewis Levy; the directors same as above.

By Exam. Lawton:

Q. Does that statement appear on the report, "same as above"?

A. Yes.

Q. Under the heading of directors?

A. Yes.

By Mr. LaTourette:

Q. In connection with the report of Ziffrin, Incorporated, is there a signature on there?

A. Yes.

Q. Will you state for the record just what writing is on there in the way of a signature?

A. S. Ziffrin, signs as president, and also Lewis Levy signs as assistant secretary.

Q. That is for 1938?

A. That is correct.

Q. Now, for 1937, by whom is the report signed?

A. Signed by S. Ziffrin as president. That is all.

[fol. 677] Q. And 1936?

A. Signed by S. Ziffrin as president and Lewis Levy as assistant secretary.

Q. 1935?

A. Signed by S. Ziffrin as president and Lewis Levy as assistant secretary.

Q. Will you take the reports of Ziffrin Truck Lines, Incorporated, as made to the Secretary of State, and take that report for the year 1935, and read the names of the directors and officers as reported by that company?

A. President, S. Ziffrin; secretary and treasurer, E. Ziffrin; vice president, Dave Ziffrin; and directors, the same as above.

Q. The words "same as above" are shown in the space provided for reporting directors?

A. Yes.

Q. Will you state for the record what names appear on that report for the corporation?

A. Signed, signature?

Q. Yes.

A. Signed by S. Ziffrin and E. Ziffrin.

Q. Take the report for 1936, please, and give us the same information.

A. President, S. Ziffrin; vice president, L. Ziffrin; vice president, D. Barrett; secretary and treasurer, Dave Ziffrin. Signed——

[fol. 678] Q. Now, tell us the directors.

A. Directors, oh, yes. It says "same as above".

Q. In other words, in the space provided for reporting directors, you have the words "same as above"?

A. That is correct.

Q. Now, take the report for 1937, and give us the same information.

A. For the year 1937, president S. Ziffrin; secretary and treasurer, E. Ziffrin; vice president D. Ziffrin; vice president, L. Ziffrin; and in the space provided for directors it says "same as above".

Q. Now, the year 1938.

A. 1938, president, S. Ziffrin; secretary and treasurer, E. Ziffrin; vice president D. Ziffrin; vice president, L. Ziffrin; in the space provided for listing directors it says "same as above".

Q. Mr. Keating, have you taken those records, from which you have stated this information into this record,

from the files of the office of the Secretary of State of the State of Indiana?

A. I have.

Q. They are part of the original records of that office?

A. Yes.

Mr. LaTourette: That is all.

Exam. Lawton: You may cross examine.

Mr. Ellis: That is all.

[fol. 679] Mr. LaTourette: That is all; thank you, very much, Mr. Keating.

Exam. Lawton: You are excused.

(Witness excused.)

Mr. LaTourette: I will call Mr. Brunow.

R. W. Brunow was sworn and testified as follows:

Direct examination.

By Mr. LaTourette:

Q. Give the reporter your name and address and occupation.

A. R. W. Brunow; 216 Pearl Street, Louisville, Kentucky; Silver Fleet, Incorporated.

Q. How long have you been with that company?

A. I have been with Silver Fleet Motor Express, Incorporated, since July 4th, 1933.

Q. Have you been employed by the company continuously since that time?

A. I have.

Q. Have you brought to this hearing a document setting forth the territory served by the Silver Fleet Company?

A. I have.

Mr. LaTourette: Mark this Protestants' Exhibits No. 9

(Protestant's Exhibit 9, Witness Brunow, identified.)

By Mr. LaTourette: I hand you what has been identified as Protestants' Exhibit No. 9, and ask you if this [fol. 680] matter sets forth the general territory served by Silver Fleet Company?

A. It is.

Q. State whether the Silver Fleet operates as a common or contract carrier?

A. They operate as a common carrier.

Q. Did you hear the testimony of Mr. Ziffrin with reference to these commodities which the applicant seeks authority to transport in this proceeding?

A. I did.

Q. Does your company as a common carrier transport those same commodities?

A. Identical; all of them.

Q. I didn't hear you.

A. Identical, the same commodities, and all of them.

Q. Now, in your experience as a traffic manager since 1933, will you state for the record if there are any conditions peculiar to those commodities which would make it impossible for a common carrier to handle those commodities in the regular order of their business?

Mr. Ellis: Wait a minute. To which we object, because regardless of what the answer might be, it would not tend to prove or disprove any issue in this case.

Exam. Lawton: How about confining it to his own company, Mr. LaTourette?

[fol. 681] Mr. LaTourette: All right. We will do that.

By Mr. LaTourette:

Q. With respect to the operations of the Silver Fleet Company, and having in mind the list of commodities which Mr. Ziffrin mentioned in his testimony, and in view of your experience as a traffic manager, and the commodities which your company has hauled, is there anything peculiar in the nature of those commodities that would make it impossible for your company to transport them in regular common carrier service?

A. May I answer that?

Exam. Lawton: Yes.

The Witness: Nothing whatsoever.

By Mr. LaTourette:

Q. Do you transport liquor in common carrier service?

A. We do.

Q. From what points?

A. From many points which commonly—do you mean the points from which we make pick-ups, points of origin?

Q. Either way you wish to describe it, whether it is picked up and then put into a road truck, whether it is taken directly in the road truck.

A. We handle numerous shipments of liquor consistently from Louisville, Kentucky, by our connecting lines from all of the distillers in the distillery area of Kentucky. That is roughly within a radius of one hundred and fifty miles of [fol. 682] Louisville, and from Lawrenceburg, Indiana, into the distillery area of Kentucky south of Cincinnati, as well as other distilleries which might be located at various points in the territory in which we either serve or draw from.

Q. To what destinations are those shipments transported?

Mr. Ellis: I want to make an objection, that we do not have here an application, nor is the nature of the service of the competing carrier such that it might be pertinent. We have the issue here, first, as to the grandfather clause rights of the company which has been in existence since 1933, the special things which the Commission set for hearing. The question, in our judgment is without and beyond the issues in this case.

Exam. Lawton: I think it has some bearing on the second issue stated in the Commission's order, and I will permit the question.

By Mr. LaTourette:

Q. Do you remember the question?

A. No.

Mr. LaTourette: Will you read it, Mr. Reporter.

(The question was read.)

The Witness: We ourselves handle shipments of liquor and deliver them in Indianapolis, Indiana, Chicago, Illinois, Cincinnati, Ohio, Columbus, Ohio, and various other points north of the Ohio River, by our connections.

By Mr. LaTourette:

Q. Have you observed, in your experience as a traffic [fol. 683] manager, that there is a rather heavy movement of liquor to Chicago?

A. There is a very heavy movement.

Q. Are you familiar with the common carriers offering common carrier service between Louisville and Chicago?

A. I am.

Q. Would you state for the record the names of common carriers operating between Louisville and Chicago?

Mr. Ellis: I would like to have the record show our objections, for the reasons heretofore stated.

Exam. Lawton: He may state the carriers with whom he is familiar.

The Witness: Huber & Huber Motor Express; Bates Motor Express; Transamerican Freight Lines; and the Great Central Transport Corporation, and Harris Forwarding Company, and Indianapolis Forwarding Company, and Bell Motor Freight Lines; Hayes Freight Lines, and Commercial Motor, Union Transfer Company; Keeshin, and Silver Fleet Motor Express, Incorporated, Railway Forwarding Company, Federal Cartage Company, and Merchants Parcel Delivery. That is all I can recall.

By Mr. LaTourette:

Q. Now, do you in your capacity as traffic manager have occasion to solicit traffic from the liquor shippers?

A. I do occasionally.

Q. I see. Have you from your experience gained any [fol. 684] knowledge as to what principle controls whether the movement of liquor shall be by contract or common carrier?

A. Very considerable.

Q. What is that knowledge and what are the facts as you know them?

A. We have found from our experience that the chief concern of the distillers is that a carrier have adequate insurance and that being equal we have found that the traffic goes to the line that has the lowest prevailing rate. By that I mean the lowest rate.

By Exam. Lawton:

Q. The two primary considerations then are rates and adequate insurance?

A. Rates and adequate insurance.

By Mr. LaTourette:

Q. I believe you testified that you have transported liquor in your common carrier service?

A. That is right.

Q. Have you had any complaints from your shippers with respect to that service?

A. None whatsoever. In regard to the rate angle of it, Mr. Examiner, I might state my reason for making that statement, if you so desire.

Mr. Ellis: I am going to object. He is under interrogation by competent counsel.

Exam. Lawton: Yes, just make your answers responsive to the questions.

[fol. 685] By Mr. LaTourette:

Q. Have you made an investigation with respect to rates of contract carriers as compared with those of common carriers that might as the result thereof lead to an opinion on your part as to whether there is a compelling force influencing the movement by contract carriers because of low rates?

Mr. Ellis: Wait a moment. I want to ask a preliminary question, if I may.

Exam. Lawton: You may ask a question.

By Mr. Ellis:

Q. Has the Interstate Commerce Commission permitted you access to the private contracts of contract carriers in their files at Washington?

A. No, sir.

Q. Then, how do you know or what investigation could you make at this time?

Mr. LaTourette: I may clear that up in this way, Mr. Ellis.——

Mr. Ellis: All right.

Mr. LaTourette: The reference is to make schedules under the contract.

Mr. Ellis: That is not the rate at which it moves at all.

Mr. LaTourette: We don't know whether it does or not. That is all we know about.

By Mr. LaTourette:

Q. Have you made an investigation as to the minimum rates applicable for the most part to liquor moving between [fol. 686] Louisville and Chicago?

A. Yes, sir.

Q. As compared with the common carrier rates between the same points?

A. We have.

Q. Will you state for the record what that investigation shows?

A. It shows very definitely, and we made a study of this situation over quite a period of time, since we are very much interested in the liquor traffic, it shows that liquor traffic is influenced primarily, as I stated before, by the rate situation. We found that prior to March——

Mr. Ellis: Wait a minute. I am going to object; it is not responsive to the question. I move to strike out all he said. He was asked to show what his investigation of these minimum schedules was. He is not testifying to that.

The Witness: That is what I am testifying about.

Exam. Lawton: All right. Make your answers more responsive.

The Witness: Relative to the minimum schedules, we found that the rates in existence, from investigation with various shippers, that they were enjoying a rate of 34 cents per 100, by a contract carrier, from Louisville to Chicago.

By Mr. LaTourette:

Q. Did you make any investigation of minimum schedules on file in the district offices of the Interstate Commerce Commission?

[fol. 687] A. We did.

Q. Did that investigation substantiate the figures that you have just discussed?

A. They certainly did.

Q. What is the common carrier rate between the same points?

A. At the time which I am speaking about, prior to March 28th, 1938, the common carrier rate was 38 cents between Louisville and Chicago on alcoholic liquors.

Q. How many units of equipment are operated by Silver Fleet?

A. 269 units.

Q. In the event that the flow of traffic requires it, is your company in a position to provide any additional facilities that might be necessary to cover the transportation of property in common carrier service in the area you serve?

Mr. Ellis: To which we object. That calls for a conclusion, which before he can answer he would have to show their financial situation, and he would have to show what volume of freight and the needs of the territory might require. It might run into millions of dollars, the question of the kind he has asked.

Exam. Lawton: Overruled. He may answer.

The Witness: We are in a position to get additional service whenever we need it.

By Mr. LaTourette:

Q. You are in a position to provide any additional equipment that may be necessary?

[fol. 688] A. That is right.

Q. In your operation do you transport full truckloads of liquor?

A. We do.

Q. As well as less than truckload lots?

A. We transport both less than truckload and truckload lots of liquor.

Q. Are you familiar with the experience of your company with respect to hijacking of liquor?

A. I am.

Q. Has that experience been such as to require guards and patrols following the truck while they are engaged in transporting liquor from your origin to destinations served by you?

A. It is not.

Mr. LaTourette: That is all.

Exam. Lawton: You may cross-examine.

Cross-examination.

By Mr. Ellis:

Q. May I inquire whether this is being offered in evidence?

Mr. LaTourette: I will, after your cross-examination, Mr. Ellis.

By Mr. Ellis:

Mr. Brunow, when you investigated the minimum schedules of contract carriers on file with the Interstate Commerce Commission, you were aware, were you not, that they did not disclose the actual rate which the contract [fol. 689] carrier charged the shipper?

A. That is right.

Q. How many contract carriers' minimum schedules covering the movement from Louisville to Chicago did you find on file with the Interstate Commerce Commission?

A. Do you mean the schedules of rates?

Q. I am talking about minimum schedules.

Exam. Lawton: Minimum schedules of contract carriers.

The Witness: We looked for only one and found one.

By Mr. Ellis:

Q. I thought you testified you made an investigation of all those schedules down there?

A. I didn't say all of them.

Q. Which did I understand you to say, then? You only examined one, is that right?

A. Schedules pertaining to Ziffrin, Incorporated.

Q. When was that, that you examined it?

A. Some time during this spring.

Q. What?

A. During this spring.

Q. During this spring?

A. This year.

Q. You want to tell the Commission now that the minimum rate set out therein was 34 cents?

A. I didn't say that.

Q. Who is it that has this 34 cent rate, minimum schedule? [fol. 690] A. I have never been asked to tell what was set forth in the schedule.

Q. Well, in answer to a question by Mr. LaTourette, you said that you made an investigation, and on cross-examination you said the only one you examined was Ziffrin, Incorporated, is that right?

A. Yes.

Mr. Ellis: Don't be passing any memorandums here.

Mr. LaTourette: I am not passing any memorandums. That is a matter which he left with me.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

Mr. Ellis: Read the last question.

(The question was read.)

The Witness: The schedules of Ziffrin, Incorporated, that is plural. That is what I said.

By Mr. Ellis:

Q. You want to tell the Commission that some time this spring that schedule showed a rate of 34 cents, is that right?

A. I didn't say that.

Q. What did you say?

A. I said that our position—our investigation among shippers disclosed the fact that traffic was moving at 34 cents by a contract carrier.

[fol. 691] Q. What was the minimum schedule of Ziffrin, Incorporated, that you found down at Washington?

A. I did not find it at Washington. I said in the district director's office at Chicago, Illinois.

Q. What was it you found, wherever you went?

A. I found that the minimum rate as stated hereon which would apply between Louisville and Chicago is 19 cents per hundred-weight. That is Ziffrin I. C. C. No. 2. Ziffrin, Incorporated, freight schedule applied on all commodities between Illinois, Indiana, Kentucky and Ohio, issued June 18th, 1936, effective July 2nd, 1936.

Q. What did you find as to the schedule which is in effect at this time, or at the time you were there, Mr. Witness?

A. I found the schedule which I am testifying. As to when it might have been cancelled, I don't know.

Q. You say you saw other schedules, didn't you say the regular schedule?

A. MF I. C. C. No. 2, 3 and 4.

Q. Number 4 is the one you examined?

A. That is right.

Q. That was the minimum schedule?

A. That is governed by the minimum schedule of Number 2, apparently.

Q. Are you sure about that?

A. That is what it stated.

[fol. 692] Q. All right. You have testified that you are familiar with the motor vehicle service between Louisville and Chicago.

A. By common carrier.

Q. And you listed a number of common carriers that you have in mind.

A. That is right.

Q. Are there any other contract carriers by motor vehicle operating, transporting liquor in truckload lots out of Louisville, Kentucky, other than Ziffrin, Incorporated?

A. I don't know.

Q. You know they do do it, don't you?

A. Yes, sir.

Q. Do you know of any other?

A. I don't know of any other.

Q. In testifying about the rates of common carriers, I believe I understood you to say that the common carrier rate was higher than that which contract carriers charged for hauling liquor between Louisville and Chicago; is that correct?

A. That is correct.

Q. Did you make any investigation of the Union Transfer Company that you have been testifying about?

A. I have not.

Q. Well, then, what company were you testifying about?

A. I was testifying about the companies who are parties to the Bureau tariffs.

[fol. 693] Q. You know as a matter of fact, don't you, Mr. Witness, that there are at this time common carriers by motor vehicle included in the list that you named that offer and will if given the business to transport liquor from Louisville to Chicago for rates lower than the minimum schedule even of Ziffrin, Incorporated?

A. I do not.

By Exam. Lawton:

Q. I wish you would state for the record, if you know, the tariff, and the effective date thereof, on which you found the 34 cent rate? Just state what tariff you examined, that you found that rate.

A. That was,—that rate is in Meyers' commodity tariff effective March 28th, 1938, and that is the common carrier rate wherein the 38 cent rate is quoted.

Q. Was that an agency tariff?

A. Yes, sir, that rate.

Q. 38.34?

A. The rate is 38 cents. That was prior to March 28. Now, on March 28, as you know, the ten per cent minimum rate schedule went into effect. That made the common carrier rate and the Bureau rate 42 cents. When they made that the traffic absolutely did not flow to common carriers, so we appealed to the Commission.

Exam. Lawton: You are extending your remarks there. I just wanted the answer about the tariff.

[fol. 694] Mr. Ellis: May I proceed, Mr. Examiner?

Exam. Lawton: Yes.

By Mr. Ellis:

Q. Mr. Witness, I will ask you whether or not it is a fact that at one time your company, the Silver Fleet, charged the rate of 36 cents on liquor between Louisville and Chicago?

A. What do you mean by "at one time"?

Q. Well, at any time, then.

A. I don't know. We may have prior to regulation.

Q. I mean since the regulation, within the last year?

A. Not to my knowledge.

Q. And don't you know that at that same time Ziffrin Truck Lines, Incorporated, a common carrier, between the same points, was charging a rate of 38 cents, and that Ziffrin Truck Lines, Incorporated, made complaint to the Interstate Commerce Commission?

Mr. LaTourette: I object to that.

Mr. Ellis: Let me ask the question, and then you can object to it.

Exam. Lawton: Finish the question.

By Mr. Ellis:

Q. —about your interpretation of the tariff, and that you recollect others charged 38 cents?

Mr. LaTourette: I object to the question on the ground it is too indefinite. Counsel mentioned some time, and at

one time. It does fix the time, and this witness is certainly [fol. 695] therefore unable to answer the question.

Exam. Lawton: Can you make the question more definite and specific and less argumentative?

By Mr. Ellis:

Q. At any time during the past two years did you charge a rate,—I mean by you, the Silver Fleet Company,—of 36 cents on points between Louisville and Chicago, when the common carrier, Ziffrin Truck Lines, Incorporated, was charging 38 cents?

Mr. LaTourette: I object to the question on the ground this witness would have to go back on the record and check to determine the information.

By Exam. Lawton:

Q. Can you answer the question?

A. I am not aware of any such situation. I am in connection with that rate situation.

Q. Your answer is that you don't know?

A. That is right.

By Mr. Ellis:

Q. Do you know that Ziffrin Truck Lines, Incorporated, the common carrier, made complaint to the Interstate Commerce Commission about your charging 36 cents when the tariff rate was 38 cents for the common carriers between Louisville and Chicago?

A. No, sir, I do not.

Q. Do you know what the rate of the Federal Cartage Company is?

A. No, sir, I do not.

Q. That is among the common carriers that you listed, isn't it?

[fol. 696] A. Yes, sir, as giving service between Louisville and Chicago.

Q. Has the Silver Fleet Company a certificate of public convenience and necessity from the Interstate Commerce Commission?

A. It is on file, the application.

Q. I did not ask you that. You know what I asked you.

Mr. LaTourette: I submit that is immaterial whether we have a certificate or not.

Exam. Lawton: Overruled. He may answer.

The Witness: We do not as yet have our certificate.

By Mr. Ellis:

Q. As to this territory that you are operating in, you do not know whether the Interstate Commerce Commission will permit you to operate there or not, do you?

Mr. LaTourette: That I submit is within the province of the Commission, and not for this witness to answer.

Exam. Lawton: I think that is obvious.

Mr. LaTourette: Purely speculative.

By Mr. Ellis:

Q. Do you claim that your company has the right to serve Lawrenceburg, Indiana?

By Exam. Lawton:

Q. Do you or do you not?

A. You mean direct? Yes, sir, we do.

Mr. Ellis: He said they do.

By Mr. Ellis:

Q. I believe you testified that the reason that the liquor moved largely between Louisville and Chicago by contract carrier was because of the rate, is that correct?

A. That is right.

[fol. 697] Q. The service does not enter into it at all, in your opinion, is that correct?

A. It most certainly does. I said the chief factor.

Q. You did not mention that a while ago, did you?

A. No. There are numerous factors I did not mention, but they are not the chief factors.

Q. I just want to ask you this question, Mr. Brunow: Assuming that last night at seven o'clock the Silver Fleet Company should have been called upon to have seventy trucks in the city of Lawrenceburg, Indiana, for the purpose of moving seventy truckloads of whiskey this morning at six o'clock, could you have performed that service?

Mr. LaTourette: I object to that question. It is purely speculative. There is no testimony here that there is such a movement offered to this applicant. Whether we could or not is immaterial, under the circumstances.

Mr. Ellis: The point about it is, there is testimony it was offered.

Exam. Lawton: No argument. He may answer.

Mr. LaTourette: Purely a hypothetical question.

The Witness: We could have gotten them there as quickly as Ziffrin, Incorporated, could.

By Mr. Ellis:

Q. I asked you if you could.

A. That is my answer.

Q. What is your answer?

[fol. 698] A. We could have gotten them there in reasonable time.

Q. Would you say you could have had them there at six o'clock this morning?

A. I won't make any statement as to any hour or minute. I said within a reasonable time.

Mr. Ellis: Step aside. I didn't want to take the time here when other people are trying to get away.

Mr. LaTourette: One other question.

Redirect examination.

By Mr. LaTourette:

Q. Counsel referred to the Union Transfer Company, and asked you if they had a lower rate than the common standard rate between Louisville and Chicago. Are you familiar with Ex Parte MC 21 minimum rate case before the Commission involving Central Freight Association Territory?

A. I am.

Q. Are you familiar with the fact that order of the Commission pegged the rates of all carriers in Central territory?

A. Yes.

Q. So if there are two rates lower than the standard common carrier rates, they are pegged by that minimum order?

A. To apply to all common carriers.
Q. Yes.

Mr. LaTourette: That is all.
Exam. Lawton: You are excused.
Mr. Thomas: A question, please.
[fol. 699] Exam. Lawton: I do not want to foreclose you, Mr. Thomas. Are we through with this gentleman?
Mr. Thomas: Thank you. That is all.

(Witness excused.)

Sam Ziffrin was sworn and testified as follows:

Direct examination.

By Mr. Goodman:

Q. Mr. Ziffrin, isn't it a fact that this liquor moved via Ziffrin Truck Lines, Incorporated, the common carrier company, in truckloads, in truckload lots, that are interchanged with other carriers destined to points in Illinois?

Mr. Ellis: To which we object, whether they interchanged or not. It doesn't mean anything. Of course, we interchanged with all common carriers.
Mr. Goodman: This was talked over between Mr. Loughry and I.
Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record. Let me have the question.

(The question was read.)

The Witness: With other common carriers, yes.

By Exam. Lawton:

Q. Your answer was yes, Mr. Ziffrin?
A. With other common carriers, yes.

Exam. Lawton: Let the record show that Mr. Ziffrin is [fol. 700] being called back as Mr. Goodman's witness.

Cross-examination.

By Mr. Loughry:

Q. And the movement you have described where Ziffrin Truck Lines, Incorporated, interchanged with other common carriers, state whether or not it is a fact that the interchange was directed by the shipper?

A. Absolutely.

Q. Which gave you a routing order for you to turn over to some common carrier?

A. As shown on the bill of lading. We do whenever the shipper directs us to.

Mr. Loughry: That is all.

Exam. Lawton: Anything further?

(No response.)

Exam. Lawton: That is all.

(Witness excused.)

Mr. La Tourette: I think, Mr. Examiner, I will put Mr. Sioussat on the stand. The association was injected into the case.

Herbert Sioussat was sworn and testified as follows:

Direct examination.

By Mr. LaTourette:

Q. Give your name and address and occupation to the reporter.

A. Herbert Sioussat, 409 Griswald, Detroit, Michigan. I [fol. 701] am secretary of the Common Carrier Division of the American Trucking Association, Incorporated.

Q. State if this is a division within the American Trucking Association as we know it?

A. It is.

Q. Corresponding to the contract carrier division, being a division of the American Trucking Association?

A. Yes.

Q. Is Ziffrin Truck Lines, Incorporated, a member of the common carrier division of the A. T. A.?

A. No, sir, they are not.

Q. State whether or not Mr. Sam Ziffrin is vice president of the A. T. A. by virtue of an election to that office?

A. No, sir, he is not.

Q. State in what manner he holds the office of vice president?

Mr. Ellis: I am going to object. They are going into the politics of the A. T. A. and denies Sam is a vice president of it.

Mr. LaTourette: No, we are going to show under what circumstances.

The Witness: The by-laws——

Mr. Ellis: Wait a minute. The circumstances of the election——

Exam. Lawton: Off the record.

(Discussion outside the record.)

[fol. 702] (The last question was read.)

The Witness: The by-laws of the American——

Mr. Ellis: Wait a minute. I am objecting to that.

By Exam. Lawton:

Q. Do you know?

A. Yes, sir.

Q. All right, you may answer.

A. The by-laws of the American Trucking Association provide that contract carrier members of the natural division shall elect a chairman and vice chairman, and such chairman will automatically hold the position in the division of vice president and be a member of the executive committee.

By Mr. LaTourette:

Q. Will you state for the record in the interest of the common carrier division of the A. T. A. with respect to whether it is for the purpose of questioning the grandfather rights in individual cases or not?

Mr. Ellis: Wait a minute. I am certainly going to object to the testimony, to what their interest is. That could only be established by a petition of intervention or statement of counsel, not by testimony of this witness. This is just another attempt, such as was made at Washington, during the argument of the contract carrier case, to alibi

for the American Trucking Association, that tries to carry water on all shoulders.

Exam. Lawton: Off the record.

(Discussion outside the record.)

Exam. Lawton: On the record.

[fol. 703] Cross-examination.

By Mr. Ellis:

Q. You said you were secretary of the common carrier division. State what that is that has been identified.

A. This is a bulletin issued by our division calling a meeting of the national common carrier division of the American Trucking Association in Chicago, on July 15th.

Q. Does it make any reference to these proceedings of Mr. Sam Ziffrin?

Mr. LaTourette: I submit the instrument will speak for itself.

Mr. Ellis: We offer the exhibit in evidence.

Mr. LaTourette: We want copies of it, if it is admitted in evidence, so that we can meet the issue.

Mr. Ellis: You issued it.

Mr. LaTourette: It is your burden. You are offering it. I am not offering it.

Exam. Lawton: Well, it will be received by the Examiner within ten days after the hearing, and that you will make copies and serve them on all parties of record.

Mr. Ellis: In the interest of everybody, I will withdraw the offer, if the Examiner will permit me.

Exam. Lawton: I will permit you to withdraw it. Now, I want to state that all exhibits that have been identified, and in the custody of the reporter, will be received.

Mr. LaTourette: That includes that Exhibit No. 9. Pro-
[fol. 704] testants' Exhibit 9

(Protestants' Exhibit 9, Witness Brunow, received in evidence.)

Exam. Lawton: Are you through with this witness?

(No response.)

Exam. Lawton: You may be excused.

(Witness excused.)

Mr. Thomas: I want to be sworn.

Mr. Ellis: Mr. Examiner, I do not want to be discourteous with the witness, since he is not going to be interrogated, and says he is going to make a statement, may I be permitted at the conclusion of it, to state such objections as I might have, if any, to what he says?

Exam. Lawton: At any time, Mr. Ellis.

WALTER K. THOMAS was sworn and testified as follows:

Direct examination

By Exam. Lawton:

Q. Give your name and address and occupation.

A. My name is Walter K. Thomas. I live at 2113 Osage Avenue, Louisville, Kentucky. I am general manager of the Reliance Trucking Company, a Kentucky corporation, with general offices in Louisville. We operate between Louisville and Frankfort, Kentucky, Bardstown and Lexington, Kentucky. We have I. C. C. certificate 65 and MC 65897.

Q. Is that your docket number?

[fol. 705] A. The actual certificate. We also have a Kentucky intrastate certificate, which has been registered with the Commission. The I. C. C. certificate is restricted to common carrier of specific commodities listed as alcoholic liquors, and distillery supplies, and our intrastate service is registered with the Commission, of commodities generally. I have over twenty-eight years experience in traffic. I have been with the company since June 1st, 1935; our company was organized March 28th, 1935. We handle a great quantity of liquor, averaging approximately three to five million pounds per month. This liquor originates at Frankfort and Lexington, Kentucky, principally. During 1937 over fifty per cent of our monthly tonnage was delivered to Ziffrin Truck Lines, Incorporated, destined to points in Illinois including Chicago, and Indiana, Wisconsin and Ohio. I might say we are a member of the Central and Southern Motor Freight Tariff Associations, of which I am on the board of directors.

Q. Just a minute. I do not want to curtail you. I don't think it is necessary. What do you want to tell us?

That you are competent to handle these commodities and capable of handling them?

A. I want to show in the record that we are a competent common carrier in the territory to handle this. I want to also bring out the fact that I know my competitors and I have no competitor to my knowledge by the name of Ziffrin, [fol. 706] Incorporated, operating in that territory.

Q. That is enough.

A. Did you put that in the record?

Q. He took it down.

A. Yes. I called on shippers and consignees to solicit business.

Q. In other words, you never heard of Ziffrin, Incorporated?

A. I have heard of them, not as a competitor, between Louisville, Frankfort and Lexington, Kentucky. I drive over the highways two or three days a week between these points. Never have I seen on the highway a truck with the name "Ziffrin" on it, either Ziffrin, Incorporated, or Ziffrin Truck Lines, Incorporated. That is all.

Exam. Lawton: Any cross-examination?

Mr. Ellis: Step aside.

Exam. Lawton: You are excused.

(Witness excused.)

Exam. Lawton: Anything further?

(No response.)

Exam. Lawton: Now, with regard to briefs, I hope that you will give us good briefs on the legal questions that seem to be involved in this proceeding, on the question of the affiliation of the two corporations, and whether one may possibly be an adjunct to the other, and on the scope and extent of the grandfather rights of the applicant; and if [fol. 707] there is affiliation, whether dual in the guise of separate corporate entities, which has been or has not been established. Those are the points that occur to me, and I would like to have treated on in briefs. How much time will you require, gentleman? Off the record.

(Discussion outside the record.)

Exam. Lawton: Back on the record. I will fix the date which brings briefs due the 11th day of October, 1938. In

the event you find it necessary to ask for additional time, please request such time approximately ten days before the date I have specified, in order that adequate consideration may be given.

Mr. Ellis: May I please inquire, have the protestants rested.

Mr. Goodman: Subject to whatever questions might arise as the result of our examination of the document to be submitted to us.

Mr. Ellis: I want to call the attention of the Examiner and the Commission, for the record, I have here produced the compliance order which was filed with the Commission and which according to my interpretation of the situation, resulted in this matter being set for public hearing, and the compliance order set aside.

Exam. Lawton: Those are already matters in this proceeding, in the docket.

Mr. Ellis: I want to call the attention of the Commission [fol. 708] and the Examiner, that in the petition in this hearing, filed by Mr. Goodman and Mr. LaTourette, and others, his statement is as follows: "Your petitioners state that they can establish by competent evidence if given an opportunity to be heard, that the applicant was not in bona fide operation as a contract carrier over the irregular routes hereinbefore set forth, on July 1, 1935." We submit that this hearing has closed, and that an opportunity was given them and they have submitted no evidence whatsoever in support of the allegation, which caused this matter to be set for public hearing.

Exam. Lawton: I am sure all due consideration will be given to that. If there is nothing further, the hearing is closed.

(At 4:00 o'clock p. m. September 13, 1938, hearing closed.)

[fols. 709-710] PLAINTIFF'S EXHIBIT NO. 1—SUPPLEMENTAL INFORMATION PERTAINING TO GRANDFATHER APPLICATION OMITTED. PRINTED SIDE PAGE 48 ANTE.

[fol. 711] PLAINTIFF'S EXHIBIT No. 2

BEFORE THE INTERSTATE COMMERCE COMMISSION

M. C. 2511

In the Matter of Application of ZIFFRIN INC., Indianapolis, Ind. For Certificate or Permit.

Comes now your petitioners, Kentucky Liquor Producers Traffic Association, and respectfully represent that they have an interest in the matter in controversy in the above entitled proceedings and desire to intervene and become parties to the said proceedings and for grounds for their proposed intervention, say:

I

That petitioners, Kentucky Liquor Producers Traffic Association, is an organization, located in the Commonwealth of Kentucky and has its principal office in the City of Louisville, Kentucky, and is organized, among other things, for the purpose of promoting the best interests of its membership in traffic matters in all categories. Its membership is comprised of traffic managers representing twenty six distilleries in the Commonwealth of Kentucky and elsewhere. It is a non-profit organization, and the membership is shown in Appendix attached hereto and made a part hereof.

[fol. 712] II

We are interested in fostering and preserving the inherent advantages under the Motor Carrier Act of 1935 and sound economic conditions in such transportation, and in promoting adequate economic and efficient service by motor carriers and reasonable charges therefor, and in aiding, developing and preserving the highway transportation system, properly adapted to the needs of the commerce of the United States and we are interested in the regulations and practices on the part of the motor carriers subject to Part 2 of the Interstate Commerce Act or the Motor Carrier Act of 1935.

III

Your petitioners respectfully pray that they may be permitted to intervene herein, presenting facts and evidence.

which they have accumulated to aid the Commission in its investigation as may be considered proper to protect the parties whom we represent as your petitioners.

IV

Since March 20th, '33, and at all of the times involved, Ziffrin Incorporated has been and is an Indiana Corporation, domiciled in Indianapolis, Indiana, authorized by its charter to engage and actually engaged, in the business of an interstate contract carrier of freight by motor vehicle, for hire.

On July 1st, 1935 and prior hereto, Ziffrin Incorporated was in bona fide operation as a contract carrier by motor vehicle between Louisville, Kentucky and Chicago, Illinois and elsewhere, conducting operations in interstate com- [fol. 713] merce along and over Federal Aid Highway U. S. No. 31 from Louisville, Northwardly, and all other roads, and on September 30, 1935, the Interstate Commerce Commission properly extended to and including February 12, 1936, the time within which the Interstate Commerce Commission might file applications for permits.

Prior to February 12, 1936, Ziffrin Incorporated filed application with the Interstate Commerce Commission for a permit for an interstate contract carrier of freight for the aforementioned territory and route, which application has continued and now continues, pending and undetermined before the Interstate Commerce Commission, with the consequence under Federal Motor Carrier Act, 1935, that the continuance of Ziffrin Inc.'s operations has been and is lawful.

Prior to the ruling of the Commission that a contract carrier must file his contracts with the Commission, many of the members of our Association used Ziffrin Incorporated's contract rates and after the Commission had issued its orders that these contracts must be on file with the Commission, Ziffrin Inc., did enter into contracts with various members of our Association and it is the intention of many other members of this Association to enter into like contracts with Ziffrin, Inc.

V

In the Federal Motor Carrier Act of 1935, Congress expressly declared it to be its policy and purpose thereby to

regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and to foster sound economic conditions in, such transpor-
[fol. 714] tation, and among such carriers, all in the public interest; to promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, preferences or advantages, and without unfair or destructive competitive practices; to coordinate transportation by and regulation of motor carriers, and other carriers; to develop and preserve a highway transportation system properly adapted to the needs of the commerce of the Nation, and of the National defense. The Act further provides that it shall apply to the transportation of property by motor carriers engaged in interstate commerce, to the provisions of facilities for such transportation, to the regulation of such transportation, control of all of which matters is vested in the Interstate Commerce Commission.

The Federal Act defines a "Contract Carrier by motor vehicle" to be any person, who or which, under special individual contracts or agreements, and whether directly, or by a lease or any other arrangement, transports passengers or property in interstate commerce by motor vehicle for compensation. It defines a "Motor Carrier" as used herein to include both common carriers by motor vehicle and contract carriers by motor vehicle.

We further believe that it was the intention of Congress to provide for contract carriers so that a monopolistic condition would not exist in the transportation facilities of this country and would preserve, in the public interest, as set forth in Section 202(a) of the Motor Carrier Act.

[fol. 715] VI

The Treasury Department of the United States Government, in transporting the silver to the new depository at West Point, N. Y., moved this silver, in the public interest, under contract rates to the depository because it was more economical than trucking to a railroad line in New York City, thence by rail to West Point and thence again by truck to the depository as that cost would greatly exceed that of a contract carrier.

We, as member of the Kentucky Liquor Producers Traffic Association, believe that we have a right to enter into

contract with a contract carrier and Ziffrin Inc. is the only logical contract carrier that can serve our needs from the State of Ky. into the States of Indiana, Illinois and Wisconsin, and other points that he could connect with common carriers, acting as an agent for the shipper and reforwarding to points beyond those specified.

We pray and know that the Commission will not be influenced by the testimony of jealous, competitive common carriers lines who are anxious to deprive the shipping public of what Congress intended they should have and destroy a reliable contract carrier to the shipping public in violation of Section 202(a) in which Congress sought to preserve common and contract carriers.

VII

Our Association further prays that the Commission will approve the application of Ziffrin Incorporated, thereby providing an adequate contract carrier service to meet the commerce needs of the members of our Association and [fol. 716] others of the general public in accordance with Section 202, paragraph (a).

Respectfully submitted, Kentucky Liquor Producers Traffic Association, by M. F. Chandler, Vice President, Registered Practitioner General Traffic Manager Frankfort Distilleries, Inc., Louisville, Kentucky.

Dated at Louisville, Ky., September 10, 1938.

[fol. 717] VERIFICATION

COMMONWEALTH OF KENTUCKY,
County of Jefferson, ss:

C. L. Weatherholt, being duly sworn, deposes and says that he is the president of the Kentucky Liquor Producers Traffic Association; that he has read the foregoing and knows the contents thereof; that the same are true as stated, except as to the matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

C. L. Weatherholt.

Subscribed in my presence and sworn to before me, by the affiant above named, this 10th day of September, 1938. Merrill Frederick Chandler. My commission expires Dec. 2, 1941. (Seal.)

[fol. 718] Members of the Kentucky Liquor Producers Traffic Association

Brown Forman Distilleries	Louisville, Ky.	C. L. Weatherholt, T. M.
Bardstown Distilling Co. Inc.	Bardstown, Ky.	F. N. Simpson, T. R.
John A. Barry Distillery	Ekron, Ky.	John R. Chauck, T. R.
Byrd Distilling Co.,	Louisville, Ky.	J. H. Byrd, Pres.
Calvert Distillers Corp.	Louisville, Ky.	Frank Luther, T. M.
Carstairs Distilleries	Louisville, Ky.	Frank Luther, T. M.
Cave Springs Distillery	Newport, Ky.	Arthur Firchman, V. P.
Churchill Distilleries	Louisville, Ky.	M. R. Weinberger, T.M.
Dant & Dant	Louisville, Ky.	
Cummins Distillery	Louisville, Ky.	W. A. Freeman
Davies County Distillery	Owensboro, Ky.	J. H. Rebeis, T. M.
Frankfort Distilleries Inc.	Louisville, Ky.	M. F. Chandler, GTM
Glenmore Distilleries	Louisville, Ky.	Al Rapier, T. M.
Glencoe Distilling Co.	Louisville, Ky.	Walter J. Doerting, Secretary
Kentucky Valley Dist. Co.	Louisville, Ky.	Alvan A. Gould
Labrot & Graham Distilleries	Frankfort, Ky.	C. V. Bixler, G. M.
H. McKenna Inc.	Fairfield, Ky.	H. J. McKenna
Old Joe Distillery	Lawrenceburg, Ky.	F. B. Mitchell
K. Taylor Distilling Co.	Frankfort, Ky.	R. P. Sohan, T. M.
Old Lewis Hunter Distillery	Lexington, Ky.	W. T. Fowler, Pres.
Ripey Bros. Distillery	Lawrenceburg, Ky.	Earnest W. Ripey
Joseph E. Seagram & Sons Distillers Corp.	Louisville, Ky.	Frank Luther, T. M.
Stitzel-Weller Distilleries	Shively, Ky.	Theo. D. Zach, O. M.
Wathen Distilleries	Louisville, Ky.	C. M. Lewis, T. M.
Woodford County Dist. Co.	Midway, Ky.	Phillip Levin
General Distillers of Ky.	Louisville, Ky.	
Schenley Products Corp.	New York City	Edw. Gusky, G. T. M.

[fol. 719] PLAINTIFF'S EXHIBIT No. 3

BEFORE THE INTERSTATE COMMERCE COMMISSION, MC 2511, ZIFFRIN INCORPORATED

Statement of partial list of cities and towns served in transportation of alcoholic liquors prior to and after July 1, 1935, in interstate commerce.

To Illinois	To Indiana
Alton	Aurora
Aurora	Elkhart
Belleville	Evansville
Bloomington	Fort Wayne
Blue Island	Indianapolis
Cairo	Lafayette

PLAINTIFF'S EXHIBIT No. 3—Continued

To Illinois	To Indiana
Centralia	Lawrenceburg
Champaign	Logansport
Chicago	Muncie
Chicago Hts.	New Albany
Danville	South Bend
Decatur	Terre Haute
Dixon	East Chicago
Dubuque (E)	Gary, Ind. Harbor
E. St. Louis	Hammond
Edwardsville	
Elgin	
Galesburg	
Geneva	
Glen Ellyn	
Herrin	
Joliet	
Kankakee	St. Louis, Mo.
Kewanee	Lonisville, Ky.
Lake Forest	
LaSalle	
Loda	
Litchfield	
Metropolis	
Moline	
Morton Grove	
Mt. Carmel	
Paris	Canton, Ohio
Peoria	Cleveland, Ohio
Pontiac	Columbus, Ohio
Quincy	Toledo, Ohio
Rock Island	Cincinnati, Ohio
Rockford	
Springfield	
Streator	
Waukegan	

Plaintiff's Exhibit No. 4

Prepared by AA ; Read by AA and BG ; Corrections made by AA

RECEIPT NUMBER A 6203

UNITED STATES OF AMERICA

STATE OF INDIANA

OFFICE OF THE SECRETARY OF STATE

I, AUGUST G. MUELLER, *Secretary of State of the State of Indiana, hereby certify that the following and hereto attached is a full, true and complete copy of* that certain instrument designated Articles of Incorporation of ZIPPRIK INCORPORATED bearing Approved and Filed date in this Office as of March 20, 1933; together with Articles of Amendment of the Articles of Incorporation of ZIPPRIK INCORPORATED bearing Approved and Filed date in this Office as of April 4, 1933,

4/12/34

as the same appears on file, as the law directs, in this office.

IN TESTIMONY WHEREOF, *I hereunto set my hand and affix the Great Seal of the State of Indiana. Done at my office, in the City*

I, AUGUST G. MUELLER, *Secretary of State of the State of Indiana, hereby certify that the following and hereto attached is a full, true and complete copy of* that certain instrument designated Articles of Incorporation of ZIFFRIN INCORPORATED bearing Approved and Filed date in this Office as of March 20, 1933; together with Articles of Amendment of the Articles of Incorporation of ZIFFRIN INCORPORATED bearing Approved and Filed date in this Office as of April 4, 1933.

Interstate Commerce
Docket No. dnc 2911 4

9/12/38

as the same appears on file, as the law directs, in this office.

IN TESTIMONY WHEREOF, *I hereunto set my hand and affix the Great Seal of the State of Indiana. Done at my office, in the City of Indianapolis, this* 7th *day of* July

A. D. 19 38.

August G. Mueller

August G. Mueller SECRETARY OF STATE

720

Form prescribed by the Secretary of State.
Form No. 1. (1st Rev.)

—a—

ARTICLES OF INCORPORATION

of

ZIPPRIN INCORPORATED

The undersigned, being three or more natural persons of lawful age, at least a majority of whom are citizens of the United States, do hereby adopt the following articles of incorporation, representing beforehand to the Secretary of State of the State of Indiana and all persons whom it may concern, that subscription lists for subscriptions to the shares of the capital stock of the above named corporation for which certificate of incorporation is hereby applied for, have heretofore been opened in accordance with law and that subscriptions to the shares of the corporation have been obtained in an amount not less than One Thousand ($1,000) Dollars.

Be it further remembered that the following Articles of Incorporation and all matters heretofore done or hereafter to be done are in accordance with "An Act concerning domestic and foreign corporations for profit, providing penalties for the violation hereof, and repealing all laws or parts of laws in conflict herewith," approved March 16, 1929, and all acts amendatory thereof and supplemental thereto.

1. The name of this corporation shall be ZIPPRIN INCORPORATED

2. The purpose or purposes for which it is formed are as follows:

In furtherance and not in limitation of the powers conferred by law;

(a) To continue as a corporation, under its corporate name, perpetually;

(b) To sue and be sued in its corporate name;

(c) To have a corporate seal and to alter the same at pleasure, and to use such seal generally, but the use of such seal shall be necessary only as required by law;

(d) To acquire, own, hold, use, lease, mortgage, pledge, sell, convey or otherwise dispose of property, real and/or personal, tangible and/or intangible, legal or equitable;

(e) To borrow money, and to issue, sell or pledge its obligations and evidences of indebtedness, and to mortgage or pledge its property and franchises to secure the payment thereof;

(f) To conduct business in this state and elsewhere; to have one or more offices out of this state; and to acquire, own, hold and use, and to lease, mortgage, pledge, sell, convey or otherwise dispose of property, real and/or personal, tangible and/or intangible, out of this state;

(g) To acquire, guarantee, hold, own and vote and to sell, assign, transfer, mortgage, pledge or otherwise dispose of the capital stock, bonds, securities or evidences of indebtedness of any other corporation, domestic or foreign;

(h) To purchase, own and/or hold and to sell and transfer

The undersigned, being three or more natural persons of lawful age, at least a majority of whom are citizens of the United States, do hereby adopt the following articles of incorporation, representing beforehand to the Secretary of State of the State of Indiana and all persons whom it may concern, that subscription lists for subscriptions to the shares of the capital stock of the above named corporation for which certificate of incorporation is hereby applied for, have heretofore been opened in accordance with law and that subscriptions to the shares of the corporation have been obtained in an amount not less than One Thousand ($1,000) Dollars.

Be it further remembered that the following Articles of Incorporation and all matters heretofore done or hereafter to be done are in accordance with "An Act concerning domestic and foreign corporations for profit, providing penalties for the violation hereof, and repealing all laws or parts of laws in conflict herewith," approved March 16, 1929, and all acts amendatory thereof and supplemental thereto.

1. The name of this corporation shall be ZIPPRIN INCORPORATED

2. The purpose or purposes for which it is formed are as follows:

In furtherance and not in limitation of the powers conferred by law;

(a) To continue as a corporation, under its corporate name, perpetually;

(b) To sue and be sued in its corporate name;

(c) To have a corporate seal and to alter the same at pleasure, and to use such seal generally, but the use of such seal shall be necessary only as required by law;

(d) To acquire, own, hold, use, lease, mortgage, pledge, sell, convey or otherwise dispose of property, real and/or personal, tangible and/or intangible, legal or equitable;

(e) To borrow money, and to issue, sell or pledge its obligations and evidences of indebtedness, and to mortgage or pledge its property and franchises to secure the payment thereof;

(f) To conduct business in this state and elsewhere; to have one or more offices out of this state; and to acquire, own, hold and use, and to lease, mortgage, pledge, sell, convey or otherwise dispose of property, real and/or personal, tangible and/or intangible, out of this state;

(g) To acquire, guarantee, hold, own and vote and to sell, assign, transfer, mortgage, pledge or otherwise dispose of the capital stock, bonds, securities or evidences of indebtedness of any other corporation, domestic or foreign;

(h) To purchase, own and/or hold and to sell and transfer (but not to vote) shares of its own capital stock of and when the capital of this Corporation is not thereby impaired;

(i) To appoint such officers and agents as the business of this Corporation may require, and to define their duties and fix their compensation;

(j) By its Board of Directors to make, alter, amend or repeal by-laws for the government and regulation of its affairs;

(k) To cease doing business and to dissolve and surrender its corporate franchise;

(l) To do all acts and things necessary, convenient or expedient to carry out the purpose for which it is formed;

(m) To carry on, engage in and/or conduct any business or businesses or do any act or acts which a natural person or persons might do and which are necessary, convenient or expedient to accomplish the purposes for which this Corporation is formed and such as are not repugnant to law; but this Corporation shall not be deemed to possess the power of carrying on the business of receiving deposits of money, bullion or foreign coins, or of issuing bills, notes or other evidences of debt for circulation as money, and this Corporation shall not engage in the business of rural loan and savings associations, credit unions nor conduct a banking, railroad insurance, surety, trust, safe deposit, mortgage guarantee or building and loan business.

(n) To acquire, lease, own, maintain and operate in said City, County and State a lumber yard, dry kilns, a warehouse and oil tanks for the purpose of supplying and/or handling, and/or storing lumber, drying lumber, storing property and/or oil, paints, gas and/or industrial alcohol to and for said corporations, and/or to or for its or their respective successors or assigns.

(o) To buy for itself, or for said corporations, lumber, oil, paints, gas, alcohol, alcoholic beverages, industrial alcohol, hardware, tools, silks, cloth and all other kinds of material and merchandise that is now or may hereafter be used by each said corporation, and/or by its or their respective successors or assigns.

(p) To handle and/or store all of the various kinds of materials, merchandise and property for each said corporation and/or either of them, that may from time to time be used by each said corporation, and/or by its or their respective successors or assigns.

(q) To engage in a general jobbing or trading business in said City of Indianapolis and State of Indiana with reference to any or all of the various kinds of materials and/or merchandise this corporation is herein authorized to buy, handle, supply and or store.

(r) To purchase, acquire, hold, mortgage, pledge, hypothecate, exchange, sell, deal in and dispose of, alone or in syndicates or otherwise in conjunction with others, commodities and other personal property of every kind, character and description whatsoever and wheresoever situated, and any interest therein.

(s) To pay for any property, real or personal, this corporation may acquire or purchase with shares of the capital stock, bonds or other obligations or securities of this corporation, or to issue its shares of stock in exchange therefor.

(t) The foregoing clauses shall be construed as powers as well as purposes, and the matters expressed in each clause shall, except if otherwise expressly provided, be in no wise limited, by reference to or inference from the terms of any other clause, but shall be regarded as independent powers and purposes;

persons might do and which are necessary, convenient or expedient to accomplish the purposes for which this Corporation is formed and such as are not repugnant to law; but this Corporation shall not be deemed to possess the power of carrying on the business of receiving deposits of money, bullion or foreign coins, or of issuing bills, notes or other evidences of debt for circulation as money, and this Corporation shall not engage in the business of rural loan and savings associations, credit unions nor conduct a banking, railroad insurance, surety, trust, safe deposit, mortgage guarantee or building and loan business.

(n) To acquire, lease, own, maintain and operate in said City, County and State a lumber yard, dry kilns, a warehouse and oil tanks for the purpose of supplying and/or handling, and/or storing lumber, drying lumber, storing property and/or oil, paints, gas and/or industrial alcohol to and for said corporations, and/or to or for its or their respective successors or assigns.

(o) To buy for itself, or for said corporations, lumber, oil, paints, gas, alcohol, alcoholic beverages, industrial alcohol, hardware, tools, silks, cloth and all other kinds of material and merchandise that is now or may hereafter be used by each said corporation, and/or by its or their respective successors or assigns.

(p) To handle and/or store all of the various kinds of materials, merchandise and property for each said corporation and/or either of them, that may from time to time be used by each said corporation, and/or by its or their respective successors or assigns.

(q) To engage in a general jobbing or trading business in said City of Indianapolis and State of Indiana with reference to any or all of the various kinds of materials and/or merchandise this corporation is herein authorized to buy, handle, supply and or store.

(r) To purchase, acquire, hold, mortgage, pledge, hypothecate, exchange, sell, deal in and dispose of, alone or in syndicates or otherwise in conjunction with others, commodities and other personal property of every kind, character and description whatsoever and wheresoever situated, and any interest therein.

(s) To pay for any property, real or personal, this corporation may acquire or purchase with shares of the capital stock, bonds or other obligations or securities of this corporation, or to issue its shares of stock in exchange therefor.

(t) The foregoing clauses shall be construed as powers as well as purposes, and the matters expressed in each clause shall, except if otherwise expressly provided, be in no wise limited, by reference to or inference from the terms of any other clause, but shall be regarded as independent powers and purposes; and the enumeration of specific powers and purposes shall not be construed to limit or restrict in any manner the meaning of general terms or the general powers of the corporation; nor shall the expres-

sion of one thing be deemed to exclude another not expressed, although it be of like nature. The corporation shall be authorized to exercise and enjoy all other powers, rights and privileges granted by an Act of the General Assembly of the State of Indiana entitled, "The Indiana General Corporation Act", approved March 16, 1929, to corporations organized thereunder, and all the powers conferred by all acts heretofore or hereafter amendatory of or supplemental to the said Act or the said laws; and the enumeration of certain powers as herein specified is not intended as exclusive of, or as a waiver of, any of the powers, rights or privileges granted or conferred by the said Act or the said laws now or hereafter in force; provided, however, that the corporation shall not in any state, territory, district, possession or country carry on any business or exercise any powers which a corporation organized under the laws thereof could not carry on or exercise.

(u) To engage in manufacturing, importing, jobbing, wholesaling, retailing and distributing of alcohol and alcoholic beverages of every kind and character and of malt, vinous and spirits and their extracts, admixtures and/or concoctions under the laws of the State of Indiana and/or of the several states and territories of the United States and/or of the United States and/or foreign countries.

...m prescribed by the Secretary of State.

—b—

3. The period during which it is to continue as a corporation is perpetual years.

4. The post office address of its principal office is 1231 east Morris Street,

Indianapolis (City) Marion (County) Indiana (State)

The name of its resident agent is Simon Siffrin

The post office address of its resident agent is 1231 east Morris Street,

Indianapolis (City) Marion (County) Indiana (State)

5. The total number of shares into which its authorized capital stock is to be divided is

One Thousand (1000)

consisting of shares as follows:

shares having par value

without

1000 shares without par value.

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Form prescribed by the Secretary of State.

6. (If the shares are to be divided into classes or kinds the designations of the different classes, the number and par value, if any, of the shares of each class, and either (a) a statement of the relative rights, preferences, limitations and restrictions of each class, or (b) a provision expressly vesting authority in the board of directors, subject to such restrictions as may be provided, to determine the relative rights, preferences, limitations and restrictions (other than voting rights) of each class by resolution or resolutions adopted prior to the issuance of any of the shares of such class; and, if the shares of any class are to be issuable in series, descriptions of the several series, and either (a) a statement of the relative rights, preferences, limitations and restrictions of each series, or (b) a provision expressly vesting authority in the board of directors, subject to such restrictions as may be provided, to determine the relative rights, preferences, limitations and restrictions (other than voting rights) of each series by resolution or resolutions adopted prior to the issuance of any of the shares of such series.)

Indicate here:

(A) 1000 shares common stock without par value with full voting powers.

(B) Shares of the capital stock of this Corporation may be issued by the Corporation for such an amount of consideration as may be fixed from time to time by the Board of Directors, and may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor actually performed for, or services actually rendered to, the corporation.

(C) When payment of the consideration for which a share was authorized to be issued shall have been received by this Corporation, such share shall be taken to be fully paid and not liable to any further call or assessment, and the holder thereof shall not be liable for any further payments.

Form prescribed by the Secretary of State.

7. (If the shares are to be divided into classes or kinds, a statement of the voting rights and powers, if any, of the shares of each class, and of each series if the shares of any class are to be issuable in series, including the extent, if any, to which the shares of each such class and series shall be entitled to vote on questions of merger, consolidation and the sale of all or of substantially all of the assets of the corporation.)

Indicate here:

No division into classes.

Form prescribed by the Secretary of State.

—•—

8. The amount of paid in capital with which this corporation will begin business is $ 500.00 (This must not be less than $500.00.)

9. The number of directors of this corporation shall be three (3) (This must be an exact number and cannot be stated in the alternative.)

10. The names and addresses of the first board of directors are as follows:

Name	Street	City	County	State
Lewis Levy	3843 Park Ave.	Indianapolis,	Marion,	Indiana.
Ralph R. Boatman,	939 E. 58th St.	Indianapolis,	Marion,	Indiana
E. H. Pettlitzer,	3060 N. Meridian St. Apt. #203	Indianapolis,	Marion,	Indiana.

Form prescribed by the Secretary of State.

11. The names and post office address of the incorporators are as follows:

Name	Street	City	County	State
Lewis Levy	5845 Park Ave.	Indianapolis,	Marion,	Indiana.
Ralph R. Boatman.	939 E. 58th Ste.	Indianapolis,	Marion,	Indiana.
E. H. Pottlitzer,	Apt. #203. 3060 N. Meridian St.	Indianapolis,	Marion,	Indiana.

Name	Street	City	County	State
E. H. Pottlitzer,	Apt. #203. 3060 N. Meridian St.	Indianapolis,	Marion,	Indiana.

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12. (Any other provisions, consistent with the laws of this state, for the regulation of the business and conduct of the affairs of the corporation, and creating, defining, limiting or regulating the powers of the corporation, of the directors or of the shareholders or any class or classes of shareholders.)

Indicate here:

(a) If the Code of by-laws of the Corporation for the time being in force so provides, the Board of Directors may designate two or more of its number to constitute an Executive Committee, which Committee to the extent provided in the Code of by-laws, shall have and exercise all of the authority of the Board of Directors in the management of the Corporation, and have power to authorize the execution of, and affixation of the seal of the Corporation to all papers or documents which may require it; in no manner however shall the board of directors or any member thereof be relieved of any responsibility imposed upon it or him by the Indiana General Corporation Act of 1929.

(b) In addition to the powers and authorities herein above or by statute expressly conferred, the Board of Directors is hereby authorized to exercise all such powers and do all such acts and things as may be exercised or done by a corporation organized and existing under the provisions of the Indiana General Corporation Act.

(c) The Corporation reserves the right to amend, alter, change or repeal any provisions contained in these Articles of Incorporation in the manner now or hereafter prescribed by the provisions of the Indiana General Corporation Act or any other pertinent enactment of the General Assembly of the State of Indiana, and all rights and powers conferred hereby on stockholders, directors and/or officers are subject to this reserve power.

(d) Election of directors need not be by ballot unless the by-laws so provide. A majority of the remaining directors shall elect directors to fill vacancies in such Board.

(e) If this Corporation enters into contracts or transacts business with one or more of its directors, or with any firm of which one or more of its directors are members, or with any other corporation or association of which one or more of its directors are shareholders, directors or officers, such contract of transaction shall not be invalidated or in any way affected by the fact that such director or directors have or may have interests therein which are or might be adverse to the interests of this Corporation, provided that such contract or transaction is entered into in good faith and in the usual course of business.

Form prescribed by the Secretary of State.

INCORPORATORS SIGN HERE

Loudia Levy	3643 Park Ave., Indianapolis Ind
Ralph R. Boatman	939 E 56th St. Indianapolis, Ind.
E H Pottlitzer	3060 N Meridian Apt 203 Indpls Ind

STATE OF INDIANA
County of Marion } ss:

~~THE THREE LINES BELOW ARE FOR IN-SERTION OF NAMES BY NOTARY~~

Before me, Mendell Rynerson, a Notary Public in and for said County and State, personally appeared

Loudia Levy

Ralph R Boatman

E H Pottlitzer

(SEAL)

and severally acknowledged the execution of the foregoing articles of incorporation.

WITNESS my hand and notarial seal this 18th day of March 19 33

Mendell Rynerson
Notary Public.

My commission expires January 7, 1934

(Articles of incorporation must be prepared and signed in triplicate in the form prescribed by the Secretary of State, by all of the incorporators and acknowledged by at least three of them before a Notary Public, and shall be presented in triplicate to the Secretary of State at his office accompanied by the fees prescribed by law.)

STATE OF INDIANA }
County of Marion } ss:

~~THE THREE LINES BELOW ARE FOR INSERTION OF NAMES BY NOTARY~~

Before me, Mendell Rynerson, a Notary Public in and for said County and State, personally appeared

Louis Levy

Ralph R Boatman

E H Pottlitzer

(SEAL)

and severally acknowledged the execution of the foregoing articles of incorporation.

WITNESS my hand and notarial seal this 18th day of March 19 33

Mendell Rynerson
Notary Public.

My commission expires January 7, 1934

(Articles of incorporation must be prepared and signed in triplicate in the form prescribed by the Secretary of State, by all of the incorporators and acknowledged by at least three of them before a Notary Public, and shall be presented in triplicate to the Secretary of State at his office accompanied by the fees prescribed by law.)

APPROVED
AND
FILED
MAR 20 1933
Frank Mayr Jr.
Secretary of State

730

Form No. 8 (1st Rev.)

For use by a Domestic Corporation incorporated or reorganized under "the Indiana General Corporation Act," approved March 16, 1929.

ARTICLES OF AMENDMENT

of the

ARTICLES OF INCORPORATION

of

ZIFFRIN INCORPORATED

SIMON ZIFFRIN (President or Vice-President) and S. C. BERMAN (Secretary or [illegible])

of the above named corporation respectfully show that:

1. The above named corporation was organized or reorganized under "The Indiana General Corporation Act," approved March 16, 1929, on March 20, 1933. (Date)

2. The above named corporation upon the proposal of its Board of Directors by resolution duly adopted by said Board of Directors setting forth the proposed amendment—and directing that the same be submitted to a vote of the shareholders entitled to vote in respect thereof at a designated meeting of such shareholders and upon the adoption thereof by said shareholders at said meeting as provided by law and as hereinafter more specifically set out, does now hereby by Simon Ziffrin its President (president or vice-president) and S. C. Berman its Secretary (secretary or assistant secretary), execute and acknowledge the following:

Articles of Amendment of its Articles of Incorporation

Exact text of Amendment

3. (a)

Article 2, Subsection (v) --
(v) - To engage in the business of trucking, contracting, hauling for hire, the distribution of goods, wares and merchandise, renting trucks and/or equipment, operating as a contract carrier, operating as a common carrier, and to engage in any and every and sundry business and/or undertaking and/or industry involving motor trucks and/or motor truck transportation.

ARTICLES OF AMENDMENT
(Continued)

The manner and vote by which it was adopted.

The above amendment was adopted in the following manner and by the following vote, that is to say:

The Board of Directors of said corporation, at a duly called (or regular meeting) of said board held on March 21, 1933, at Indianapolis, Ind. (Date, Place) adopted the following resolution of Articles of Amendment of the Articles of Incorporation of said corporation:

Text of Resolution of Directors

"Resolved, That

"Whereas the Board of Directors of Ziffrin Incorporated is comprised of all of the owners of all of the issued and outstanding stock of the said corporation, the same being 1000 shares of the common capital stock of the said corporation, and,

Whereas, all of the said directors being present, we propose the following resolution and move its adoption and submission to a special stockholders meeting to be convened immediately upon the adjournment of this meeting of the Board of Directors.:

"Be it resolved that the Articles of Incorporation of Ziffrin Incorporated be amended by adding a new and additional subsection under Article 2 thereof which said article contains the purpose or purposes for which the said corporation was formed, said subsection to be designated as subsection (v) under said Article 2, and to read as follows:

(v) - To engage in the business of trucking, contracting, hauling for hire, the distribution of goods, wares and merchandise, renting trucks and/or equipment, operating as a contract carrier, operating as a common carrier, and to engage in any and every and sundry business and/or undertaking and/or industry involving motor trucks and/or motor truck transportation."

ARTICLES OF AMENDMENT
(Continued)

"Be it further resolved, that this proposed amendment be submitted to a vote of the shareholders entitled to vote thereon at a ~~XXX~~ special meeting (special or annual), to be held on the 21st day of March, 1933, at Indianapolis, Ind.

To be used only in case a special meeting is called

"Be it further resolved that a special meeting of the shareholders entitled to vote thereon is hereby called for March 21, 1933 (Date) at Indianapolis, Ind. and the secretary is hereby directed to give notice thereof as required by law."

(b) At the shareholders' meeting the shareholders entitled to vote in respect of said amendments to the Articles of Incorporation, upon the call and notice required by law, did adopt the above amendment (~~X~~) by the affirmative vote of all of ~~the holders of at least a majority and the greater proportion as required by the Articles of Incorporation, of the outstanding shares entitled to vote thereon and/or by the affirmative vote of the holders of at least a majority and/or such greater proportion as required by the Articles of Incorporation of the outstanding shares entitled to vote thereon, and/or at least a majority of the outstanding shares of all other classes entitled to vote thereon~~ all of the outstanding common capital stock of said corporation being all those which are entitled to vote thereon.

ARTICLES OF AMENDMENT
(Continued)

(SEAL)

In witness whereof the undersigned President (president or vice-president) and Secretary (secretary or assistant secretary) respectively of said corporation have hereunto set their hands and seals this 4th day of April, 1933.

Simon Ziffrin
(President or Vice-President)

S O Berman
(Secretary or Assistant Secretary)

State of INDIANA }
County of MARION } ss:

Before me, Ruth S. Lomax, a Notary Public in and for said County and State, personally appeared Simon Ziffrin and S. O. Berman well known to me to be the President (president or vice-president) and Secretary (secretary or assistant secretary), respectively of the above named corporation and severally acknowledged the execution of the foregoing Articles of Amendment.

APPROVED
FILED
APR 4 1933
Frank. Mayr Jr
SECRETARY OF STATE

Witness my hand and notarial seal this 4th day of April 1933

(SEAL)

In witness whereof the undersigned President (president or vice-president) and Secretary (secretary or assistant secretary) respectively of said corporation have hereunto set their hands and seals this 4th day of April, 1933.

Simon Ziffrin
(President or Vice-President)

S O Berman
(Secretary or Assistant Secretary)

State of INDIANA
County of MARION } as:

Before me, Ruth S. Lomax, a Notary Public in and for said County and State, personally appeared Simon Ziffrin and S. O. Berman well known to me to be the President (president or vice-president) and Secretary (secretary or assistant secretary), respectively of the above named corporation and severally acknowledged the execution of the foregoing Articles of Amendment.

APPROVED
AND
FILED
APR 4 1933
Frank. Mayr Jr
SECRETARY OF STATE

Witness my hand and notarial seal this 4th day of April, 1933.

(Seal)

Ruth S Lomax
Notary Public

(SEAL) My commission expires Mar. 14-1935

(Articles of Amendment must be executed in triplicate; all three copies must be approved by the Secretary of State, who retains one copy; one copy must be filed by the corporation with the County Recorder of the County in which the Articles of Incorporation of such corporation were or should have been filed for record, before the corporation exercises any authority under the amendment; the corporation retains the other copy.)

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Plaintiff's Exhibit No. 5 5 Plaintiff's Ex. No. 5

Prepared by AH ; Read by AH and AA ; Corrections made by AH

RECEIPT NUMBER A 6486

UNITED STATES OF AMERICA

STATE OF INDIANA

OFFICE OF THE SECRETARY OF STATE

copy x No 3 Dy

I, AUGUST G. MUELLER, *Secretary of State of the State of Indiana, hereby certify that the following and hereto attached is a full, true and complete copy of* that certain instrument designated Articles of Incorporation of ZIFFRIN TRUCK LINES INC., bearing Approved and Filed date in this office as of July 31, 1934; together with Amendment thereto bearing Approved and Filed date in this office as of December 2, 1936;

Interstate Commerce Commission
Docket No. MC 2911 Exhibit No. 5
Witness Ziffrin
Date 9/12/38
Reporter Parks

as the same appears on file, as the law directs, in this office.

IN TESTIMONY WHEREOF, *I hereunto set my hand and affix the Great Seal of the State of Indiana. Done at my office in the State*

UNITED STATES OF AMERICA

STATE OF INDIANA

OFFICE OF THE SECRETARY OF STATE

copy X No 3 Dy

I, AUGUST G. MUELLER, *Secretary of State of the State of Indiana, hereby certify that the following and hereto attached is a full, true and complete copy of* that certain instrument designated Articles of Incorporation of ZIFFRIN TRUCK LINES INC., bearing Approved and Filed date in this office as of July 31, 1934; together with Amendment thereto bearing Approved and Filed date in this office as of December 2, 1936;

Interstate Commerce Commission
Docket No. MC 2511 Exhibit No. 5
Witness Ziffrin
Date 9/12/38
Reporter Rice

as the same appears on file, as the law directs, in this office.

IN TESTIMONY WHEREOF, *I hereunto set my hand and affix the Great Seal of the State of Indiana. Done at my office, in the City of Indianapolis, this* 22 *day of* July

A. D. 19 38.

August G. Mueller. SECRETARY OF STATE

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Form prescribed by the Secretary of State.
Form No. 3. (1st Rev.)

—a—

ARTICLES OF INCORPORATION

of

ZIFFRIN TRUCK LINES INC.

The undersigned, being three or more natural persons of lawful age, at least a majority of whom are citizens of the United States, do hereby adopt the following articles of incorporation, representing beforehand to the Secretary of State of the State of Indiana and all persons whom it may concern, that subscription lists for subscriptions to the shares of the capital stock of the above named corporation for which certificate of incorporation is hereby applied for, have heretofore been opened in accordance with law and that subscriptions to the shares of the corporation have been obtained in an amount not less than One Thousand ($1,000) Dollars.

Be it further remembered that the following Articles of Incorporation and all matters heretofore done or hereafter to be done are in accordance with "An Act concerning domestic and foreign corporations for profit, providing penalties for the violation hereof, and repealing all laws or parts of laws in conflict herewith," approved March 16, 1929, and all acts amendatory thereof and supplemental thereto.

1. The name of this corporation shall be ZIFFRIN TRUCK LINES INC.

2. The purpose or purposes for which it is formed are as follows:

In furtherance and not in limitation of the powers conferred by law:

(a) To continue as a corporation, under its corporate name, perpetually;

(b) To sue and be sued in its corporate name;

(c) To have a corporate seal and to alter the same at pleasure, and to use such seal generally, but the use of such seal shall be necessary only as required by law;

(d) To acquire, own, hold, use, lease, mortgage, pledge, sell, convey or otherwise dispose of property, real and/or personal, tangible and/or intangible, legal or equitable;

(e) To borrow money, and to issue, sell or pledge its obligations and evidences of indebtedness, and to mortgage or pledge its property and franchises to secure the payment thereof;

(f) To conduct business in this state and elsewhere; to have one or more offices out of this state; and to acquire, own, hold and use, and to lease, mortgage, pledge, sell, convey or otherwise dispose of property, real and/or personal, tangible and/or intangible, out of

ZIFFRIN TRUCK LINES INC.

The undersigned, being three or more natural persons of lawful age, at least a majority of whom are citizens of the United States, do hereby adopt the following articles of incorporation, representing beforehand to the Secretary of State of the State of Indiana and all persons whom it may concern, that subscription lists for subscriptions to the shares of the capital stock of the above named corporation for which certificate of incorporation is hereby applied for, have heretofore been opened in accordance with law and that subscriptions to the shares of the corporation have been obtained in an amount not less than One Thousand ($1,000) Dollars.

Be it further remembered that the following Articles of Incorporation and all matters heretofore done or hereafter to be done are in accordance with "An Act concerning domestic and foreign corporations for profit, providing penalties for the violation hereof, and repealing all laws or parts of laws in conflict herewith," approved March 16, 1929, and all acts amendatory thereof and supplemental thereto.

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(d) To acquire, own, hold, use, lease, mortgage, pledge, sell, convey or otherwise dispose of property, real and/or personal, tangible and/or intangible, legal or equitable;

(e) To borrow money, and to issue, sell or pledge its obligations and evidences of indebtedness, and to mortgage or pledge its property and franchises to secure the payment thereof;

(f) To conduct business in this state and elsewhere; to have one or more offices out of this state; and to acquire, own, hold and use, and to lease, mortgage, pledge, sell, convey or otherwise dispose of property, real and/or personal, tangible and/or intangible, out of this state;

(g) To acquire, guarantee, hold, own and vote and to sell, assign, transfer, mortgage, pledge or otherwise dispose of the capital stock, bonds, securities or evidences of indebtedness of any other corporation, domestic or foreign;

(h) To purchase, own and/or hold and to sell and transfer (but not to vote) shares of its own capital stock or and when the capital of this Corporation is not thereby impaired;

(i) To appoint such officers and agents as the business of this Corporation may require, and to define their duties and fix their compensation;
(j) By its Board of Directors to make, alter, amend or repeal by-laws for the government and regulation of its affairs;
(k) To cease doing business and to dissolve and surrender its corporate franchise;
(l) To do all acts and things necessary, convenient or expedient to carry out the purpose for which it is formed;
(m) To carry on, engage in and/or conduct any business or businesses or do any act or acts which a natural person or persons might do and which are necessary, convenient or expedient to accomplish the purposes for which this Corporation is formed and such as are not repugnant to law; but this Corporation shall not be deemed to possess the power of carrying on the business of receiving deposits of money, bullion or foreign coins, or of issuing bills, notes or other evidences of debt for circulation as money, and this Corporation shall not engage in the business of rural loan and savings associations, credit unions nor conduct a banking, railroad insurance, surety, trust, safe deposit, mortgage guarantee or building and loan business.
(n) To acquire, lease, own, maintain and operate in said City, County and State a lumber yard, dry kilns, a warehouse and oil tanks for the purpose of supplying and/or handling, and/or storing lumber, drying lumber, storing property and/or oil, paints, gas and/or industrial alcohol to and for said corporation, and/or to or for its or their respective successors or assigns.
(o) To buy for itself, or for said corporation, lumber, oil, paints, gas, alcohol, alcoholic beverages, industrial alcohol, hardware, tools, silks, cloth and all other kinds of material and merchandise that is now or may hereafter be used by each said corporation, and/or by its or their respective successors or assigns.
(p) To handle and/or store all of the various kinds of materials, merchandise and property for each said corporation and/or either of them, that may from time to time be used by each said corporation, and/or by its or their respective successors or assigns.
(q) To engage in a general jobbing or trading business in said City of Indianapolis and State of Indiana with reference to any or all of the various kinds of materials and/or merchandise this corporation is herein authorized to buy, handle, supply and/or store.
(r) To purchase, acquire, hold, mortgage, pledge, hypothecate, exchange, sell, deal in and dispose of , alone or in syndicates or otherwise in conjunction with others, commodities and other personal property of every kind, character and description whatsoever and wheresoever situated, and any interest therein.

... of franchise;
(l) To do all acts and things necessary, convenient or expedient to carry out the purpose for which it is formed;
(m) To carry on, engage in and/or conduct any business or businesses or do any act or acts which a natural person or persons might do and which are necessary, convenient or expedient to accomplish the purposes for which this Corporation is formed and such as are not repugnant to law; but this Corporation shall not be deemed to possess the power of carrying on the business of receiving deposits of money, bullion or foreign coins, or of issuing bills, notes or other evidences of debt for circulation as money, and this Corporation shall not engage in the business of rural loan and savings associations, credit unions nor conduct a banking, railroad insurance, surety, trust, safe deposit, mortgage guarantee or building and loan business.
(n) To acquire, lease, own, maintain and operate in said City, County and State a lumber yard, dry kilns, a warehouse and oil tanks for the purpose of supplying and/or handling, and/or storing lumber, drying lumber, storing property and/or oil, paints, gas and/or industrial alcohol to and for said corporation, and/or to or for its or their respective successors or assigns.
(o) To buy for itself, or for said corporation, lumber, oil, paints, gas, alcohol, alcoholic beverages, industrial alcohol, hardware, tools, silks, cloth and all other kinds of material and merchandise that is now or may hereafter be used by each said corporation, and/or by its or their respective successors or assigns.
(p) To handle and/or store all of the various kinds of materials, merchandise and property for each said corporation and/or either of them, that may from time to time be used by each said corporation, and/or by its or their respective successors or assigns.
(q) To engage in a general jobbing or trading business in said City of Indianapolis and State of Indiana with reference to any or all of the various kinds of materials and/or merchandise this corporation is herein authorized to buy, handle, supply and/or store.
(r) To purchase, acquire, hold, mortgage, pledge, hypothecate, exchange, sell, deal in and dispose of , alone or in syndicates or otherwise in conjunction with others, commodities and other personal property of every kind, character and description whatsoever and wheresoever situated, and any interest therein.
(s) To pay for any property, real or personal, this corporation may acquire or purchase with shares of the capital stock, bonds or other obligations or securities of this corporation, or to issue its shares of stock in exchange therefor.
(t) The foregoing clauses shall be construed as powers as well as purposes, and the matters expressed in each clause shall, except if otherwise expressly provided, be in no wise limited, by reference to or inference from the terms of any other clause, but shall be regarded as independent powers and purposes; and the enumeration of specific powers and purposes shall not be construed to limit or restrict in any manner the meaning of general terms or the general powers of the corporation; nor shall the expres-

sion of one thing be deemed to exclude another not expressed, although it be of like nature. The Corporation shall be authorized to exercise and enjoy all other powers, rights and privileges granted by an Act of the General Assembly of the State of Indiana entitled, "The Indiana General Corporation Act", approved March 16, 1929, to corporations organized thereunder, and all the powers conferred by all acts heretofore or hereafter amendatory of or supplemental to the said Act or the said laws; and the enumeration of certain powers as herein specified is not intended as exclusive of, or as a waiver of, any of the powers, rights or privileges granted or conferred by the said Act or the said laws now or hereafter in force; provided, however, that the corporation shall not in any state, territory, district, possession or country carry on any business or exercise any powers which a corporation organized under the laws thereof could not carry on or exercise.

(u) To engage in any and every business and industry involving motor truck transportation.

(v) To engage in general inter-state and intra-state trucking and transportation business; to own, lease and operate motor vehicles, terminals, warehouses, routes and all and sundry equipment necessary or convenient for carrying out the purposes of this corporation and its business, and its undertaking.

orm prescribed by the Secretary of State.

—b—

3. The period during which it is to continue as a corporation is perpetual years.

4. The post office address of its principal office is 1231 W. Morris Street,

Indianapolis (City) Marion (County) Indiana (State)

The name of its resident agent is Simon Ziffrin

The post office address of its resident agent is 1231 West Morris Street,

Indianapolis (City) Marion (County) Indiana (State)

5. The total number of shares into which its authorized capital stock is to be divided is

One Thousand (1000)

consisting of shares as follows:

[redacted]

1000 shares without par value.

rm prescribed by the Secretary of State.

6. (If the shares are to be divided into classes or kinds the designations of the different classes, the number and par value, if any, of the shares of each class, and either (a) a statement of the relative rights, preferences, limitations and restrictions of each class, or (b) a provision expressly vesting authority in the board of directors, subject to such restrictions as may be provided, to determine the relative rights, preferences, limitations and restrictions **(other than voting rights)** of each class by resolution or resolutions adopted prior to the issuance of any of the shares of such class; and, if the shares of any class are to be issuable in series, descriptions of the several series, and either (a) a statement of the relative rights, preferences, limitations and restrictions of each series, or (b) a provision expressly vesting authority in the board of directors, subject to such restrictions as may be provided, to determine the relative rights, preferences, limitations and restrictions **(other than voting rights)** of each series by resolution or resolutions adopted prior to the issuance of any of the shares of such series.)

Indicate here:

(A) 1000 shares common stock without par value with full voting powers.
(B) Shares of the capital stock of this Corporation may be issued by the Corporation for such an amount of consideration as may be fixed from time to time by the Board of Directors, and may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor actually performed for, or services actually rendered to, the corporation.
(C) When payment of the consideration for which a share was authorized to be issued shall have been received by this Corporation, such share shall be taken to be fully paid and not liable to any further call or assessment, and the holder thereof shall not be liable for any further payments.

m prescribed by the Secretary of State.

7. (If the shares are to be divided into classes or kinds, a statement of the voting rights and powers, if any, of the shares of each class, and of each series if the shares of any class are to be issuable in series, including the extent, if any, to which the shares of each such class and series shall be entitled to vote on questions of merger, consolidation and the sale of all or of substantially all of the assets of the corporation.)

Indicate here:

No division into classes.

Form prescribed by the Secretary of State.

—e—

8. The amount of paid in capital with which this corporation will begin business is $ 500.00 (This must not be less than $500.00.)

9. The number of directors of this corporation shall be three (3) (This must be an exact number and cannot be stated in the alternative.)

10. The names and addresses of the first board of directors are as follows:

Name	Street	City	County	State
Simon Ziffrin	5124 No. Pennsylvania St.	Indianapolis,	Marion,	Indiana.
Esther Ziffrin	5124 No. Pennsylvania St.	Indianapolis,	Marion,	Indiana.
Dave Ziffrin	5124 No. Pennsylvania St.	Indianapolis,	Marion,	Indiana.

. orm prescribed by the Secretary of State.

—f—

11. The names and post office address of the incorporators are as follows:

Name	Street	City	County	State
Simon Ziffrin	5124 No. Pennsylvania St.	Indianapolis,	Marion,	Indiana.
Esther Ziffrin	5124 No. Pennsylvania St.	Indianapolis,	Marion,	Indiana.
Dave Ziffrin	5124 No. Pennsylvania St.	Indianapolis,	Marion,	Indiana.

Name	Street	City	County	State
Esther Ziffrin	5124 No. Pennsylvania St.	Indianapolis,	Marion,	Indiana.
Dave Ziffrin	5124 No. Pennsylvania St.	Indianapolis,	Marion,	Indiana.

as prescribed by the Secretary of State.

12. (Any other provisions, consistent with the laws of this state, for the regulation of the business and conduct of the affairs of the corporation, and creating, defining, limiting or regulating the powers of the corporation, of the directors or of the shareholders or any class or classes of shareholders.)

Indicate here:

(a) If the Code of by-laws of the Corporation for the time being in force so provides, the Board of Directors may designate two or more of its number to constitute an Executive Committee, which Committee to the extent provided in the Code of by-laws, shall have and exercise all of the authority of the Board of Directors in the management of the Corporation, and have power to authorize the execution of, and affixation of the seal of the Corporation to all papers or documents which may require it; in no manner however shall the board of directors or any member thereof be relieved of any responsibility imposed upon it or him by the Indiana General Corporation Act of 1929.
(b) In addition to the powers and authorities herein above or by statute expressly conferred, the Board of Directors is hereby authorized to exercise all such powers and do all such acts and things as may be exercised or done by a corporation organized and existing under the provisions of the Indiana General Corporation Act.
(c) The Corporation reserves the right to amend, alter, change or repeal any provisions contained in these Articles of Incorporation in the manner now or hereafter prescribed by the provisions of the Indiana General Corporation Act or any other pertinent enactment of the General Assembly of the State of Indiana, and all rights and powers conferred hereby on stockholders, directors and/or officers are subject to this reserve power.
(d) Election of directors need not be by ballot unless the by-laws so provide. A majority of the remaining directors shall elect directors to fill vacancies in such Board.
(e) If this Corporation enters into contracts or transacts business with one or more of its directors, or with any firm of which one or more of its directors are members, or with any other corporation or association of which one or more of its directors are shareholders, directors or officers, such contract or transaction shall not be invalidated or in any way affected by the fact that such director or directors have or may have interests therein which are or might be adverse to the interests of this Corporation, provided that such contract or transaction is entered into in good faith and in the usual course of business.

Form prescribed by the Secretary of State.

—h—

~~INCORPORATION~~ SIGN HERE

Dave Ziffrin

S. Ziffrin

E. Ziffrin

STATE OF INDIANA
County of Marion } ss:

~~CERTIFICATE OF ACKNOWLEDGMENT~~

Before me, Sidney J. Seligman, a Notary Public in and for said County and State, personally appeared

Dave Ziffrin

S. Ziffrin

E. Ziffrin

(SEAL)

and severally acknowledged the execution of the foregoing articles of incorporation.

WITNESS my hand and notarial seal this 31st day of July, 1934

(SEAL)

Sidney J. Seligman
Notary Public.

My commission expires 9-29-36

(Articles of incorporation must be prepared and signed in triplicate in the form prescribed by the Secretary of State, by all of the incorporators and acknowledged by at least three of them before a Notary Public, and shall be presented in triplicate to the Secretary of State at his office accompanied by the fees prescribed by law.)

APPROVED

Dave Ziffrin

S. Ziffrin

E. Ziffrin

STATE OF INDIANA }
County of Marion } ss:

Before me, Sidney J. Seligman, a Notary Public in and for said County and State, personally appeared

Dave Ziffrin

S. Ziffrin

E. Ziffrin

(SEAL)

and severally acknowledged the execution of the foregoing articles of incorporation.

WITNESS my hand and notarial seal this 31st day of July, 1934

(SEAL)

Sidney J. Seligman
Notary Public.

My commission expires 9-29-36

(Articles of incorporation must be prepared and signed in triplicate in the form prescribed by the Secretary of State, by all of the incorporators and acknowledged by at least three of them before a Notary Public, and shall be presented in triplicate to the Secretary of State at his office accompanied by the fees prescribed by law.)

APPROVED
AND
FILED
JUL 31 1934
Frank. Mayr Jr
SECRETARY OF STATE

745

385

Form No. 8 (1st Rev.)

For use by a Domestic Corporation incorporated or reorganized under "the Indiana General Corporation Act," approved March 16, 1929.

ARTICLES OF AMENDMENT

of the

ARTICLES OF INCORPORATION

of

ZIFFRIN TRUCK LINES, INC.

SIMON ZIFFRIN (President or Vice-President) and E. ZIFFRIN (Secretary or Assistant Secretary)

of the above named corporation respectfully show that:

1. The above named corporation was organized or reorganized under "The Indiana General Corporation Act," approved March 16, 1929, on August 1934 (Date)

2. The above named corporation upon the proposal of its Board of Directors by resolution duly adopted by said Board of Directors setting forth the proposed amendment—and directing that the same be submitted to a vote of the shareholders entitled to vote in respect thereof at a designated meeting of such shareholders and upon the adoption thereof by said shareholders at said meeting as provided by law and as hereinafter more specifically set out, does now hereby by Simon Ziffrin its President (president or vice-president) and E. Ziffrin its Secretary (secretary or assistant secretary), execute and acknowledge the following:

Articles of Amendment of its Articles of Incorporation

Exact text of Amendment

3. (a)

Article 5. One thousand (1000) shares of common stock having a par value of One Hundred ($100) Dollars each, or $100,000.00, and five hundred (500) shares of preferred stock of One Hundred ($100) Dollars each, or $50,000.

of the

ARTICLES OF INCORPORATION

of

ZIFFRIN TRUCK LINES, INC.

SIMON ZIFFRIN (President or Vice-President) and E. ZIFFRIN (Secretary or Assistant Secretary)

of the above named corporation respectfully show that:

1. The above named corporation was organized or reorganized under "The Indiana General Corporation Act," approved March 16, 1929, on August 1934 (Date)

2. The above named corporation upon the proposal of its Board of Directors by resolution duly adopted by said Board of Directors setting forth the proposed amendment—and directing that the same be submitted to a vote of the shareholders entitled to vote in respect thereof at a designated meeting of such shareholders and upon the adoption thereof by said shareholders at said meeting as provided by law and as hereinafter more specifically set out, does now hereby by Simon Ziffrin its President (president or vice-president) and E. Ziffrin its Secretary (secretary or assistant secretary) execute and acknowledge the following:

Articles of Amendment of its Articles of Incorporation

Exact text of Amendment

3. (a)

Article 5. One thousand (1000) shares of common stock having a par value of One Hundred ($100) Dollars each, or $100,000.00, and five hundred (500) shares of preferred stock of One Hundred ($100) Dollars each, or $50,000.

Article 6. (A). One thousand (1000) shares of common stock having a par value of One Hundred ($100) Dollars each, or $100,000.00, and five hundred (500) shares of preferred stock of One Hundred ($100) Dollars each, or $50,000.00., with full voting powers for common stock only.

ARTICLES OF AMENDMENT
(Continued)

The manner and vote by which it was adopted.

The above amendment was adopted in the following manner and by the following vote, that is to say:

The Board of Directors of said corporation, at a duly called (or ~~regular~~ special meeting) of said board held on July 6, 1936 (Date), **at** Indianapolis, Ind. (Place) **adopted the following resolution of Articles of Amendment of the Articles of Incorporation of said corporation:**

Text of Resolution of Directors

"Resolved, That

"Whereas the Board of Directors of Ziffrin Truck Lines, Inc. is comprised of all of the owners of all of the issued and outstanding stock of the said corporation, the same being one thousand (1,000) shares of the common capital stock of the said corporation, and,

Whereas, all of the said directors being present, we propose the following resolution and move its adoption and submission to a special stockholders meeting to be convened immediately upon the adjournment of this meeting of the Board of Directors:

Be it Resolved that the Articles of Incorporation of Ziffrin Truck Lines, Inc. be amended by changing Article 5 to read as follows:

"One thousand (1000) shares of common stock having a par value of One Hundred ($100) Dollars each, or $100,000.00, and five hundred (500) shares of preferred stock of One Hundred ($100) Dollars each, or $50,000.00."

Also Article 6 (A):

"One thousand (1000) shares of common stock having a par value of One Hundred ($100) Dollars each, or $100,000.00, and five hundred (500) shares of preferred stock of One Hundred ($100) Dollars each, or $50,000.00, with full voting powers for common stock only.

ARTICLES OF AMENDMENT
(Continued)

"Be it further resolved, that this proposed amendment be submitted to a vote of the shareholders entitled to vote thereon at a (an) special (special or annual) meeting, to be held on the 6th day of July, 19 36 at Indianapolis, Ind.

6

To be used only in case a special meeting is called

"Be it further resolved that a special meeting of the shareholders entitled to vote thereon is hereby called for July 6th, 1936 (Date) at Indianapolis, Ind. and the secretary is hereby directed to give notice thereof as required by law."

(b) At the shareholders' meeting the shareholders entitled to vote in respect of said amendments to the Articles of Incorporation, upon the call and notice required by law, did adopt the above amendment(s) by the affirmative vote of all of the holders of at least a majority of the outstanding shares entitled to vote thereon, and/or by the affirmative

vote of the shareholders entitled to vote thereon at a (an) special
(special or annual)
meeting, to be held on the 6th day of July, 19 36
at Indianapolis, Ind.

To be used only in case a special meeting is called

"Be It further resolved that a special meeting of the shareholders entitled to vote thereon is hereby called for July 6th, 1936 at
(Date)
Indianapolis, Ind. and the secretary is hereby directed to give notice thereof as required by law."

(b) At the shareholders' meeting the shareholders entitled to vote in respect of said amendments to the Articles of Incorporation, upon the call and notice required by law, and adopt the above amendment(s) by the affirmative vote of the holders of at ~~least a majority and not less than two-thirds (or such greater proportion as required by the statutes of Indiana pursuant to which the corporation was organized) of the outstanding shares of stock entitled to vote thereon, and/or by the affirmative vote of the holders of at least a majority and not less than two-thirds (or such greater proportion as required by the statutes of Indiana pursuant to which the corporation was organized) of the outstanding shares of each class of stock entitled to vote thereon as a class under the Articles of Incorporation of the corporation, and/or by the holders of not less than two-thirds (or such greater proportion as required by the statutes of Indiana pursuant to which the corporation was organized) of the outstanding shares of all other classes entitled to vote thereon~~ all of the outstanding common capital stock of said corporation being all those which are entitled to vote thereon.

ARTICLES OF AMENDMENT
(Continued)

To be used if the total authorized amount or number of shares is increased by this amendment.

(c) 1. The amount or number of shares heretofore authorized are as follows:

One Thousand (1000) shares without par value

2. The additional amount or number of shares authorized by this amendment are as follows:

500 shares preferred stock having a par value of $100.00 each.

To be used if the total authorized amount or number of shares is reduced by this amendment.

(d) 1. The amount or number of shares heretofore authorized are as follows:

2. The amount or number of shares heretofore authorized that have been issued are as follows:

3. The amount or number of shares of reduction authorized by this amendment is as follows:

4. Said reduction will be accomplished in the following manner, to-wit:

ARTICLES OF AMENDMENT
(Continued)

To be used if any change is made in the shares without increasing or reducing the total authorized amount or number of shares.

(e) 1. The amount or number of shares heretofore authorized are as follows:

One Thousand (1,000) shares without par value.

2. The amount or number of shares heretofore authorized that have been issued are as follows:

One Thousand (1,000) shares without par value.

3. The change to be made by this amendment is

One Thousand (1,000) shares common stock of par value of One Hundred ($100) Dollars each, and five hundred (500) shares of preferred stock of One Hundred ($100) Dollars each.

4. The manner in which the change shall be effected is:

All outstanding certificates shall be recalled and new certificates issued, which certificates must be signed by the president and secretary of the corporation, and the seal of the corporation placed thereon.

ARTICLES OF AMENDMENT
(Continued)

In witness whereof the undersigned President (president or vice-president) and Secretary (secretary or assistant secretary) respectively of said corporation have hereunto set their hands and seals this 30 day of Nov., 19 36

S. Ziffrin
(President or Vice-President)

Esther Ziffrin
(Secretary or Assistant Secretary)

State of Indiana }
County of Marion } ss:

APPROVED
AND
FILED
DEC 2 1936
August G. [illegible]
SECRETARY OF STATE

(SEAL)

Before me, [illegible] a Notary Public in and for said County and State, personally appeared Simon Ziffrin and S. Ziffrin well known to me to be the President (president or vice-president) and Secretary (secretary or assistant secretary), respectively of the above named corporation and severally acknowledged the execution of the foregoing Articles of Amendment.

Witness my hand and notarial seal this 30 day of Nov, 19 36

(Seal) (SEAL)

S B Fox

In witness whereof the undersigned President and Secretary
(president or vice-president) (secretary or assistant secretary)
respectively of said corporation have hereunto set their hands and seals this 30 day of
Nov. , 19 36

S. Ziffrin
(President or Vice-President)

Esther Ziffrin
(Secretary or Assistant Secretary)

State of Indiana }
County of Marion } ss:

APPROVED
AND
FILED
DEC 2 1936
SECRETARY OF STATE

(SEAL)

Before me, August C. [illegible], a Notary Public in and for said County and State, personally appeared Simon Ziffrin and E. Ziffrin well known to me to be the President (president or vice-president) and Secretary (secretary or assistant secretary), respectively of the above named corporation and severally acknowledged the execution of the foregoing Articles of Amendment.

Witness my hand and notarial seal this 30 day of Nov , 19 36

(Seal) (SEAL)

S S Fox
Notary Public.

My commission expires Jan 27/39

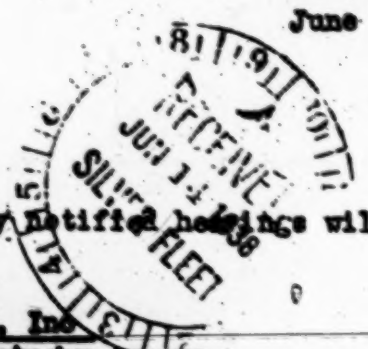
(Articles of Amendment must be executed in triplicate; all three copies must be approved by the Secretary of State, who retains one copy; one copy must be filed by the corporation with the County Recorder of the County in which the Articles of Incorporation of such corporation were or should have been filed for record, before the corporation exercises any authority under the amendment; the corporation retains the other copy.)

Plaintiff's Exhibit No. 6

DIVISION OF MOTOR TRANSPORTATION
FRANKFORT, KENTUCKY

Plaintiff Exh. No. 6

June 13, 1938



Gentlemen:

J-Ref-6

You are hereby notified hearings will be held on the following application and certificate:

Ziffrin, Inc
187 Kentucky Avenue
Indianapolis, Indiana - for common carrier truck certificate to operate motor freight line from Louisville to the Kentucky-Indiana State Line - Jefferson Co

Ziffrin Truck Lines, Inc
Kentucky Avenue
Indianapolis, Indiana - Certificate, No. 260 - To clear up any question as to how the certificate was first issued, the Ziffrin Truck Lines, Inc., wants hearing

These hearings will be held on Thursday, June 23, 1938 in the New Capitol Building at Frankfort, Kentucky, hearings to start at ten o'clock A.M.

If you care to protest the granting of these certificates, please notify this office on or before June 19, 1938, and state upon what grounds protest will be made.

Interstate Commerce Commission
Docket No. MC 25 11 Exhibit No. 6
Witness Ziffrin
(Commissioner's
(Commission's
(Respondent's
(Protestant's
Reporter Pahe
9/13/38

Yours very truly

D. C. Moore, Director
Division of Motor Transportation

Notices sent to the following:

Ziffrin, Inc., Indianapolis, Indiana
Ziffrin Truck Lines, Inc., Indianapolis
Hargis Truck Line, Toll City, Ind
Whitney Transfer Company, Bowling Green
Silver Fleet Motor Express, Louisville
W. T. Collins & Son, New Albany
Hancock Truck Line, Evansville
Huber & Huber Motor Express, Louisville
Kooshin Motor Express, South Bend, Ind
Western Transfer Co., Inc., St. Louis
The Bell Lines, Inc., 123 N. Preston, Louisville
Hargis Truck Co., Toll City, Indiana
Commercial Motor Frt., Louisville
Here Comes Rocks, Louisville
The Globe Cartage Co., Indianapolis

Gentlemen:

J-192-6

You are hereby notified hearings will be held on the following application and certificate:

Ziffrin, Inc
1187 Kentucky Avenue
Indianapolis, Indiana - for common carrier truck certificate to operate motor freight line from Louisville to the Kentucky-Indiana State Line - Jefferson Co

Ziffrin Truck Lines, Inc
Kentucky Avenue
Indianapolis, Indiana - Certificate, No. 360 - To clear up any question as to how the certificate was first issued, the Ziffrin Truck Lines, Inc., wants hearing

These hearings will be held on Thursday, June 23, 1938 in the New Capitol Building at Frankfort, Kentucky, hearings to start at ten o'clock A.M.

If you care to protest the granting of these certificates, please notify this office on or before June 19, 1938, and state upon what grounds protest will be made.

Interstate Commerce Commission
Docket No. MC 25 11 Exhibit No. 6
Witness Ziffrin
Applicant's
(Commission's)
(Respondents)
(Protestants) 9/13/38 Pahe

Yours very truly

D. C. Moore, Director
Division of Motor Transportation

Notices sent to the following:

Ziffrin, Inc., Indianapolis, Indiana
Ziffrin Truck Lines, Inc., Indianapolis
Hargis Truck Line, Toll City, Ind
Whitney Transfer Company, Bowling Green
Silver Fleet Motor Express, Louisville
W. T. Collins & Son, New Albany
Hancock Truck Line, Evansville
Huber & Huber Motor Express, Louisville
Adkins Transfer Company, Nashville
C. B. Newbold Transfer, Owensboro
I. C. Railroad Company, Louisville
B & O Railroad Company, Louisville
Big Four Ruy Co., Louisville
Monon Route Ruy Co., Louisville, Ky
Pennsylvania Ruy Co., Louisville
Indianapolis Forwarding Co., Louisville
Transamerican Frt. Lines, Inc., Detroit and Louisville
County judge and county attorney of Jefferson County

Keoshin Motor Express, Sports Bond, Ind
Western Transfer Co., Inc., St. Louis
The Bell Lines, Inc., 123 N. Preston, Louisville
Hargis Truck Co., Toll City, Indiana
Commercial Motor Frt., Louisville
Here Comes Rocks, Louisville
The Globe Cartage Co., Indianapolis
Killion Motor Frt Lines, Washington, Ind
Bates Motor Transport Lines, Inc, Chicago
Husmann & Report Frt Lines, St. Louis
Hendors & Allen, Salem, Ind
Johnnersmith Transfer, New Albany, Ind
W. T. Collins & Son, New Albany
Ben Wolfe, Jeffersonville
Lew Ullrich, 312 Kentucky Hotel, Lville

752

fr

395

[fol. 753] PLAINTIFF'S EXHIBIT No. 7

STATE OF INDIANA

PUBLIC SERVICE COMMISSION

No. 12261

PETITION OF NEW YORK CENTRAL RAILROAD, BALTIMORE & OHIO RAILROAD, PENNSYLVANIA RAILROAD, RAILWAY EXPRESS AGENCY, INC., HOMER L. McNAUGHTON D/B/A McNAUGHTON TRANSPORTATION SERVICE AND WILBUR T. KILES D/B/A KILES EXPRESS AGAINST ZIFFRIN INCORPORATED AND ZIFFRIN TRUCK LINES, INCORPORATED

Approved February 7, 1936

APPEARANCES:

For Petitioners: For the rail lines, L. W. Horning, Atty., Indianapolis, Indiana; For Homer L. McNaughton, Harry Yockey, Atty., Indianapolis, Indiana; For Kiles Express, Michael Bohland, Atty., Batesville, Indiana.

For Indiana Railroad, Bowman Elder, Receiver: J. A. VanOsdol, Atty., by F. D. Norviel.

For Respondents: For Ziffrin Truck Lines, Inc., Ziffrin Incorporated, Jacob Weiss and Sidney J. Seligman, Attys., Indianapolis, Indiana.

For Shippers: For Old Quaker Co. and Joseph E. Seagrams & Sons, George Barnard, Atty., Indianapolis, Indiana; L. W. MacElveny, General Traffic Manager.

[fol. 754] By the COMMISSION:

Petitioners filed their verified petition herein September 27, 1935, asking the Commission to conduct a public hearing upon the matters complained of and to enter an order cancelling and revoking the certificates of public convenience and necessity of Ziffrin Truck Lines, Incorporated and the permit of Ziffrin Incorporated, and to issue its order compelling said respondents to cease the unlawful operations complained of and for all other just and proper relief in the premises.

Pursuant to notice published in The Indianapolis Times and The Hoosier Sentinel, two newspapers of general circu-

lation printed and published in Marion County, Indiana, more than ten days before the date of hearing and notices mailed to various interested parties, a public hearing was held in the Rooms of the Commission, 401 State House, Indianapolis, Indiana, at 10 o'clock A. M., Tuesday, October 22, 1935, with appearances as above noted.

Indiana Railroad, Bowman Elder, Receiver, appeared by counsel and filed petition to intervene as a party petitioner and such permission was granted.

The evidence shows that at the time petition was filed herein, respondent, Ziffrin Incorporated, was operating under intrastate contract carrier permit 209 B-1 issued pursuant to an order of the Commission approved June 18, 1935; that under said permit the hauling of whiskey was not prohibited.

The evidence further shows that respondents, Ziffrin Incorporated and Ziffrin Truck Lines, Inc., have occasionally transported property for hire which they were not authorized to transport under certificates and permits held by said respondents.

The evidence further shows that respondents, Ziffrin Incorporated and Ziffrin Truck Lines, Inc., have not kept separate records and accounts for each of said corporations; that waybills, bills of lading and freight bills covering shipments transported by said respondents have not always shown on their face by which of said respondents such shipments were transported; that due to the methods of respondents in keeping their records and accounts and the make-up of waybills, bills of lading and freight bills covering shipments transported by said respondents, it is not reasonably possible for this Commission to determine whether or not certain operations complained of were authorized under certificates and permits held by said respondents.

[fol. 755] Subsequent to the hearing in this cause petitioner, Homer L. McNaughton, filed his supplemental petition herein on the 29th day of October, 1935, alleging certain irregularities in the operations of respondents.

Thereafter, on the 5th day of November, 1935, respondents filed motion to dismiss said supplemental petition, and, thereafter, on the 29th day of January, 1936, petitioner, Homer L. McNaughton, filed motion to dismiss his said supplemental petition.

The Commission, having heard and considered the evidence in this cause and the supplemental petition and motions to dismiss the same and being sufficiently advised in the premises, finds:

1. That the motion of petitioner, Homer L. McNaughton, to dismiss supplemental petition filed by him should be sustained and said supplemental petition dismissed.

2. That the prayer of the petition herein for an order cancelling and revoking the certificates of public convenience and necessity of respondent, Ziffrin Truck Lines, Inc., and the permit of Ziffrin Incorporated should be denied.

3. That respondents, and each of them, should be ordered to keep separate and distinct records and accounts and said records and accounts and the waybills, bills of lading and freight bills covering shipments transported by said respondents should be so kept and made as to disclose the character of each shipment transported, the names of the consignor and the consignee, rate charged therefor, the total amount of the charge and by whom paid, and the correct corporate name of the carrier.

It Is Therefore Ordered by the Public Service Commission

1. That the motion of petitioner, Homer L. McNaughton, to dismiss supplemental petition filed by him be and the same is hereby sustained, and said supplemental petition is hereby dismissed.

2. That the prayer of the petition herein for an order cancelling and revoking the certificates of public convenience and necessity of respondent, Ziffrin Truck Lines, Inc., and the permit of Ziffrin Incorporated, be and the same is hereby denied.

[fol. 756] 3. That respondents, and each of them, be and they are hereby ordered to keep separate and distinct records and accounts and said records and accounts and the waybills, bills of lading and freight bills covering shipments, transported by said respondents shall be so kept and made as to disclose the character of each shipment transported, the names of the consignor and the consignee, rate charged therefor, the total amount of the charge and by whom paid, and the correct corporate name of the carrier.

McCart, Trabue, Cook concur: Approved February 7, 1936.

Attest: Richard W. Sharpless, Secretary.

[fol. 757] PLAINTIFF'S EXHIBIT No. 8

DECISION OF THE DIVISION OF MOTOR TRANSPORTATION, RENDERED JUNE 29, 1938

Applicant—

Ziffrin, Incorporated, 1187 Kentucky Avenue, Indianapolis, Indiana. Represented by H. V. McChesney, Jr., Attorney, Frankfort, Kentucky. Assisted by Norton Goldsmith, Attorney, Louisville, Kentucky; Howell Ellis, Attorney, Indianapolis, Indiana.

Protestants—

Silver Fleet Motor Express, Louisville, Kentucky. Represented by R. W. Brunow, Louisville, Kentucky. Huber & Huber, Keeshin Motor Express, Bates Motor Express, TransAmerican Freight Line, Decatur Cartage Company, represented by Stanley B. Mayer, Attorney, Louisville, Kentucky.

On Application for Common Carrier Truck Certificate to Operate Motor Freight Line from Louisville to the Kentucky-Indiana State Line, Jefferson County

[fol. 758] DECISION—Rendered June 29, 1938

A hearing was held on June 23, 1938 before the Director of the Division of Motor Transportation of Kentucky on the application of *Ziffrin, Incorporated* of 1187 Kentucky Avenue, Indianapolis, Indiana for common carrier truck certificate to operate a motor freight line from *Louisville, Kentucky to the Kentucky-Indiana State Line, Jefferson County, to do Interstate Business Only.*

This application was protested by several carriers operating out of Louisville, Kentucky.

Stanley B. Mayer of Louisville, Kentucky, attorney for the protesting truck lines, requested that the application of Ziffrin, Incorporated be dismissed, stating that unless

the applicant would state it was operating under the Interstate Commerce Commission as a common carrier, it had no standing before the Commission.

H. B. McChesney, Jr., attorney for the applicant, stated he would neither deny nor affirm that applicant was operating as a common carrier or contract carrier; but the evidence of Sam Ziffrin, owner of Ziffrin, Incorporated, showed that applicant had always operated as a contract carrier and that it is now asking for a common carrier certificate so it would be able to transport whiskey out of the State of Kentucky as a common carrier. Mr. Ziffrin also stated he had operated under the application filed with the Interstate Commerce Commission as a contract carrier, and asked that this State grant him a common carrier certificate to operate to the Kentucky-Indiana State Line out of Louisville, Kentucky.

Copy of the application filed by applicant with the Interstate Commerce Commission at Washington, which copy is on file in the office of the Division of Motor Transportation, shows that Ziffrin, Incorporated is operating as a [fol. 759] contract carrier.

Ziffrin Truck Lines, Incorporated holds a common carrier certificate over the same route applied for by Ziffrin, Incorporated. It is a well known fact to this division, and to all other persons and firms interested, that the Ziffrin Truck Lines, Incorporated, which now holds a common carrier certificate, and Ziffrin, Incorporated are owned by the same interests. The records in this division show that fact, and the Director is fully convinced that Sam Ziffrin owns both of the above named companies, and that Ziffrin, Incorporated is purely a contract carrier and is requesting this certificate for the purpose of putting in a lower rate as a contract carrier than the established common carrier rates which he is allowed to put in as an interstate operator.

Considering all of these facts, the Director sustains the motion of the attorney of the protestants, and the application of *Ziffrin, Incorporated, is hereby dismissed.*

Done at Frankfort, Kentucky on this, the twenty-ninth, day of June, 1938.

D. C. Moore, Director, Division of Motor Transportation.

DCM/fr

(Here follow 4 photolithographs, side folios 760-763.)

SILVER FLEET

General Offices: 216 Pearl St., Louisville, Ky. Phone: JAckson 5143

TERMINALS

Birmingham, Ala.
1901 Fourth Ave., South
Phone: 3-5277

Chattanooga, Tenn.
1200 Fort St.
Phone: 6-2121

Chicago, Ill.
833 W. 36th St.
Phone: BOUlevard 3220

Cincinnati, Ohio
Bank and Winchell Sts.
Phone: CHerry 7755

Columbus, Ind.
First St. at Jackson
Phone: 747

Columbus, Ohio
563 Cleveland Ave.
Phone: Adams 6244

Indianapolis, Ind.
Senate & Merrill Sts.
Phone: Riley 5328

Kingsport, Tenn.
Cherokee Street
Phone: 400

Knoxville, Tenn.
Preston & Henrietta Sts.
Phone 2-3115

Seymour, Ind.
Tipton at Indianapolis
Phone: 338

Lafayette, Ind.
1420 Elizabeth St.
Phone: 2175

Louisville, Ky.
216 E. Liberty St.
Phone: JAckson 5143

Middlesboro, Ky.
Fitzpatrick Ave.
Phone: 199

Nashville, Tenn.
519 McGavock St.
Phone: 6-2158

CERTIFICATES AND FRANCHISES

INDIANA	P. S. C. No. 75-A 1; 76-A 1; 77-A 1; 75-A 3
KENTUCKY	36, 39, 40, 227, 288, 109-A-B-C
TENNESSEE	357 A-B-C-D-E-F-G-H.
OHIO	4476, 4882, 5184, 5185.
VIRGINIA	F-388

INTERSTATE COMMON CARRIER I. C. C. DOCKET NUMBERS

78914-40858-2376

TARIFF PUBLISHING BUREAUS

Southern Motor Carriers Rate Conference, Atlanta, Ga
Indiana Motor Rate & Tariff Bureau, Indianapolis, Ind
Central States Motor Freight Bureau, Inc., Chicago, Ill

EQUIPMENT

Two Hundred Sixty-nine (269) units of equipment, all company-owned. Twenty-eight refrigerator units, operating north of the Ohio River only. Every piece of equipment is van-type, completely enclosed, dust-proof and waterproof.

TERMINALS

Birmingham, Ala. 1901 Fourth Ave., South Phone: 3-5277	**Columbus, Ohio** 563 Cleveland Ave. Phone: Adams 6244	**Lafayette, Ind.** 1420 Elizabeth St. Phone: 2175
Chattanooga, Tenn. 1200 Fort St. Phone: 6-2121	**Indianapolis, Ind.** Senate & Merrill Sts. Phone: Riley 5328	**Louisville, Ky.** 216 E. Liberty St. Phone: JAckson 5143
Chicago, Ill. 833 W. 36th St. Phone: BOUlevard 3220	**Kingsport, Tenn.** Cherokee Street Phone: 400	**Middlesboro, Ky.** Fitzpatrick Ave. Phone: 199
Cincinnati, Ohio Bank and Winchell Sts. Phone: CHerry 7755	**Knoxville, Tenn.** Preston & Henrietta Sts. Phone 2-3115	**Nashville, Tenn.** 519 McGavock St. Phone: 6-2158
Columbus, Ind. First St. at Jackson Phone: 747	**Seymour, Ind.** Tipton at Indianapolis Phone: 338	

CERTIFICATES AND FRANCHISES

INDIANA	P. S. C. No. 75-A 1; 76-A 1; 77-A 1; 75-A 3.
KENTUCKY	36, 39, 40, 227, 286, 109-A-B-C.
TENNESSEE	357 A-B-C-D-E-F-G-H.
OHIO	4478, 4882, 5164, 5165.
VIRGINIA	F-386

INTERSTATE COMMON CARRIER I. C. C. DOCKET NUMBERS

78914-40858-2378

TARIFF PUBLISHING BUREAUS

Southern Motor Carriers Rate Conference, Atlanta, Ga.
Indiana Motor Rate & Tariff Bureau, Indianapolis, Ind.
Central States Motor Freight Bureau, Inc., Chicago, Ill.

EQUIPMENT

Two Hundred Sixty-nine (269) units of equipment, all company-owned. Twenty-eight refrigerator units, operating north of the Ohio River only. Every piece of equipment is van-type, completely enclosed, dust-proof and waterproof.

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*Alabama City
*Albertville
*Ardmore
*Athens
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*Bessemer
Birmingham
*Blount Springs
*Boaz
Boyles
*Cedar Lake
*Cottonville
*Courtland
*Cullman
*Decatur
Ensley
Fairfield
*Falkville
*Flint
*Florence
*Gadsden
*Garden City
Gardendale
Grasselli
*Guntersville
*Hanceville
*Hartselle
*Huntsville
*Joe Wheeler Dam
*Kimberly
*Lacon
*Leighton
Lewisburg
*Morris
*Mountainboro
*Muscle Shoals
*New Hope
*Nitrate
North Birmingham
*Owen's Cross Roads
Pratt City
*Sheffield
*Tanner
Tarrant
*Town Creek
*Trinity
*Tuscumbia
*Vinemount
*Warrior
*Wheeler
*Wheeler Dam

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Flintstone
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East Chicago
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Fowler
Frankfort
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North Hayden
Otterbein
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Royalton
St. John
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Sellersburg
Seymour
Speeds
Speedway
Templeton
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Underwood
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Dillon
Dione
Disney
Draper
East Pineville
Emanuel
Everts
Ferndale
Flat Lick
Fort Mitchell
Fort Thomas
Four Mile
Grays
Grays Knob
Harlan
Heidrick
Hulen
Kentenia
Kenvir
Kitts
Latonia
Layman
Lejunior
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Ludlow
Lynch
Mary Helen
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Nolansburg
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Roespoint
St. Matthews
South Fort Mitchell
Southgate
Straight Creek
Surran
Tinsley
Totz
Tways
Twila
Verda
Wallins Creek
Wasiota
Williamsburg
Wofford
Woodbine
Yancy

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Glendale
Ivorydale
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Easerville
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Norton

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North Birmingham
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Pratt City
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*Vinemount
*Warrior
*Wheeler
*Wheeler Dam

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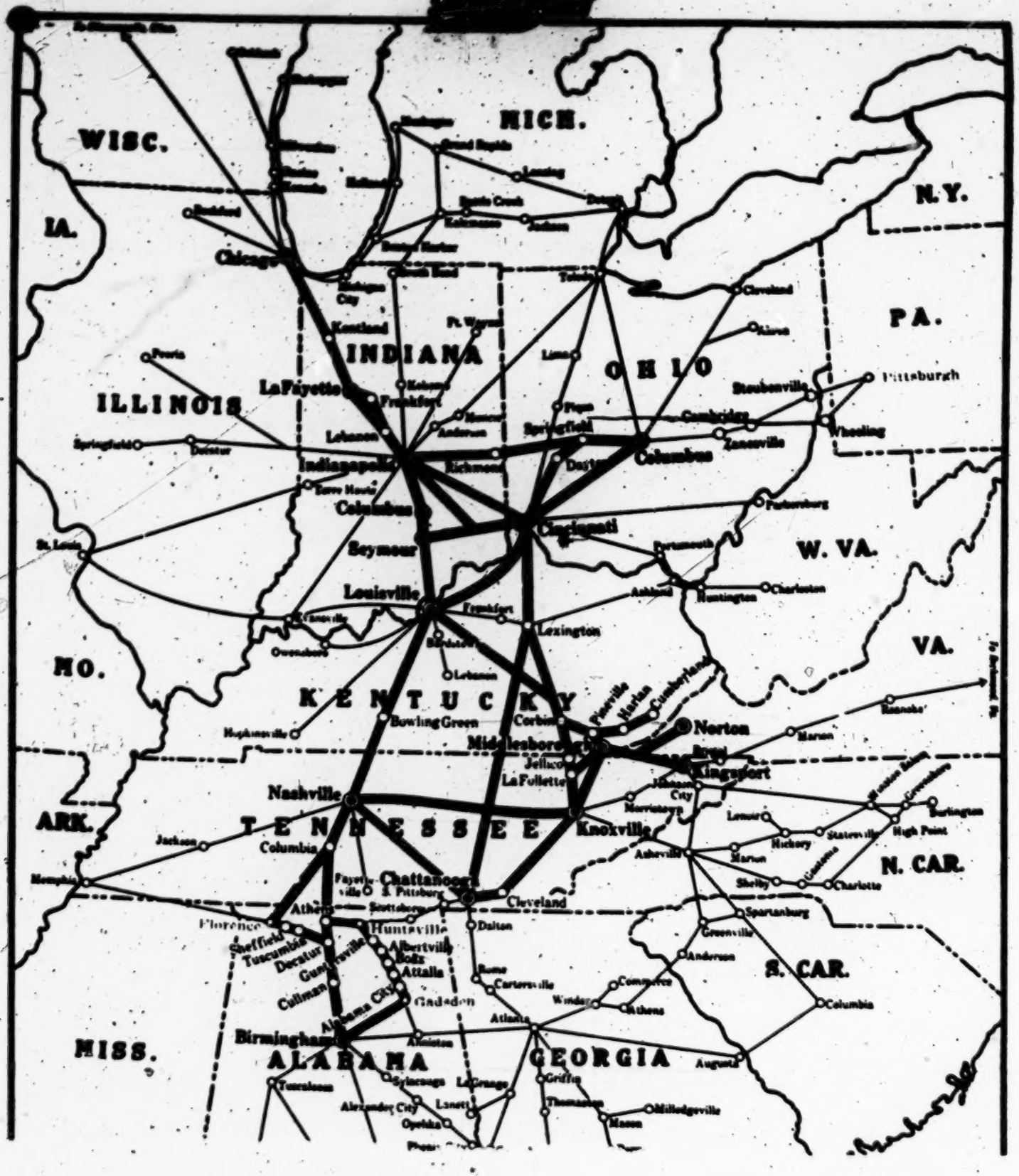
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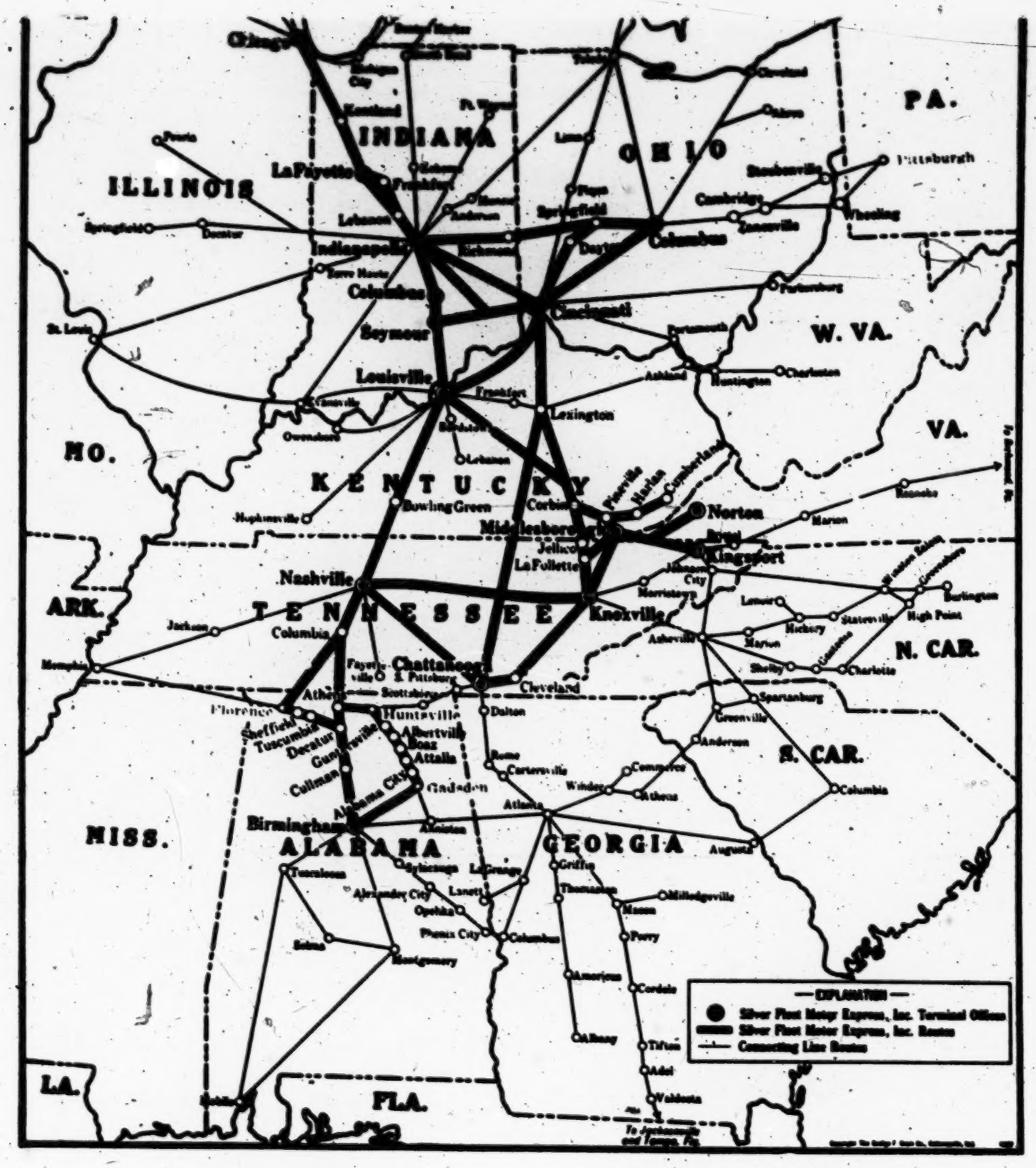
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Wheeling
Charleston
Roanoke
Memphis
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Dalton
Anderson
Spartanburg
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Montgomery
Albany
Valdosta
EXPLANATION
Silver Fleet Motor Express, Inc. Terminal Offices
Silver Fleet Motor Express, Inc. Routes
Connecting Line Routes

762

4020

Insurance

CARGO

A. Company. . . . . .The Phoenix Insurance Co. of Hartford, Connecticut.
B. Policy No. . . . . .IMF 430856.
C. Expiration . . . . . .Continuous.
D. Amount . . . . . .$20,000.00 per Truck or Trailer.
$40,000.00 Catastrophe.

$20,000.00 Cigars per Truck or Trailer.
$10,000.00 Cigarettes and Manufactured Tobacco.
$12,000.00 Wines and Liquors.

Coverage for loss by theft, hold-up or robbery. On other risks, above cargo limits of $20,000 per truck and $40,000 per catastrophe apply.

PUBLIC LIABILITY--PROPERTY DAMAGE

A. Company. . . . . .American Fidelity and Casualty Co.
B. Policy No. . . . . .PT22372.
C. Expiration . . . . . .January 1, 1939.
D. Amount . . . . . .P.L. $25,000.00 and $50,000.00.
P.D. $5,000.00

COMPENSATION

A. Company. . . . . .U.S. Fidelity and Guaranty Co.
B. Policy No. . . . . .(Master). . . . . .Z 831435.
C. Expiration . . . . . .(Master). . . . . .February 17, 1939
D. Amount . . . . . .Statutory Requirements.

FEATURES OF POLICIES

1. Largest amount of General Cargo coverage of any Motor Carrier.
2. Cargo policy is continuous and in effect until notice of cancellation is given.
3. Insurance carried with same agency over a period of five (5) years.
4. Broadest coverage with no deductible feature.
5. $12,000.00 coverage per truck or trailer on Wines and Liquors.
6. $10,000.00 coverage per truck or trailer on Cigars, Cigarettes and Manufactured Tobacco.
7. Public Liability and Property Damage carried with one of the largest Casualty and Surety Companies.
8. Compensation insurance covers all statutory requirements of every state in which we operate.
9. All insurance carried with legal reserve old line conference companies.
10. All policies carry the endorsements of the Interstate Commerce Commission as well as the State Commissions of each State in which we operate. Copies of the policies are on file in their respective offices.

The above information is subject to change without notice. Further information will be furnished by our Insurance Agents, Pfeiffer and Pfeiffer, Martin Brown Building, Louisville, Ky., or by our General Office, 216 Pearl Street, Louisville, Kentucky.

FIDELITY BONDS

$20,000.00 Cigars per Truck or Trailer.
$10,000.00 Cigarettes and Manufactured Tobacco.
$12,000.00 Wines and Liquors.

robbery. On other risks, above cargo limits of $20,000 per truck and $40,000 per catastrophe apply.

PUBLIC LIABILITY--PROPERTY DAMAGE

A. Company. . . . . .American Fidelity and Casualty Co.
B. Policy No. . . . . .PT22572.
C. Expiration . . . . . .January 1, 1939.
D. Amount . . . . . .P.L. $25,000.00 and $50,000.00.
P.D. $5,000.00

COMPENSATION

A. Company. . . . . .U.S. Fidelity and Guaranty Co.
B. Policy No. . . . . .(Master). . . . . .Z 851435.
C. Expiration . . . . . .(Master). . . . . .February 17, 1939
D. Amount . . . . . .Statutory Requirements.

FEATURES OF POLICIES

1. Largest amount of General Cargo coverage of any Motor Carrier.
2. Cargo policy is continuous and in effect until notice of cancellation is given.
3. Insurance carried with same agency over a period of five (5) years.
4. Broadest coverage with no deductible feature.
5. $12,000.00 coverage per truck or trailer on Wines and Liquors.
6. $10,000.00 coverage per truck or trailer on Cigars, Cigarettes and Manufactured Tobacco.
7. Public Liability and Property Damage carried with one of the largest Casualty and Surety Companies.
8. Compensation insurance covers all statutory requirements of every state in which we operate.
9. All insurance carried with legal reserve old line conference companies.
10. All policies carry the endorsements of the Interstate Commerce Commission as well as the State Commissions of each State in which we operate. Copies of the policies are on file in their respective offices.

The above information is subject to change without notice. Further information will be furnished by our Insurance Agents, Pfeiffer and Pfeiffer, Martin Brown Building, Louisville, Ky., or by our General Office, 216 Pearl Street, Louisville, Kentucky.

FIDELITY BONDS

SILVER FLEET MOTOR EXPRESS, INC. is party to Fidelity Bond No. 2,562,000, issued to the American Trucking Association, Inc. by the Fidelity Deposit Company of Maryland.

[fol. 764] Before the Interstate Commerce Commission
Application of Zeppelin, Incorporated M C 2511

Digest of Documentary Proof of Operation

[Ed. 765]

Analysis of Shipments Hauled by Eiffrig, Incorporated. MC 2511

Company Abstract Record

Date	Abstract Number	Origin	Destination	Commodity	Weight	Exception
4/21/33	954	Milwaukee, Wisc.	Frankfort, Ind.	Beer	5,100	
4/22/33	963	Indpls., Ind.	Milwaukee, Wisc.	Beer (Empties)	5,308	
4/25/33	983	Milwaukee, Wisc.	Muncie, Ind.	Beer	5,100	
4/26/33	993	Milwaukee, Wisc.	Huntington, Ind.	Beer	10,200	
4/26/33	998	Milwaukee, Wisc.	Lafayette, Ind.	Beer	20,400	
4/26/33	997	Indpls., Ind.	Milwaukee, Wisc.	Empties	6,800	
4/26/33	979	Milwaukee, Wisc.	Kokomo, Ind.	Beer	10,200	
	979	Milwaukee, Wisc.	Peru, Ind.	Beer	10,200	
A/ 1/33	980	Peru, Ind.	Milwaukee, Wisc.	Empties	1,706	
	981	Kokomo, Ind.	Milwaukee, Wisc.	Empties	5,555	
	982	Kokomo, Ind.	Milwaukee, Wisc.	Empties	1,240	
	983	Milwaukee, Wisc.	Angola, Indiana	Beer	5,100	
A/ 2/33	988	Milwaukee, Wisc.	Marion, Ind.	Beer	10,200	
A/13/33	1068	Indpls., Ind.	Chicago, Ill.	Empties	5,000	
A/24/33	1082	Indpls., Ind.	Chicago, Ill.	Empties	5,000	
	1083	Indpls., Ind.	Chicago, Ill.	Empties	7,000	
	1084	Chicago, Ill.	Delphi, Ind.	Beer	21,400	
	1085	Chicago, Ill.	Terre Haute, Ind.	Beer	17,288	
	1086	Chicago, Ill.	Terre Haute, Ind.	Beer	14,445	
	1087	Chicago, Ill.	Greencastle, Ind.	Beer	10,700	
6/14/33	3098	Muncie, Ind.	Louisville, Ky.	Empties	3,500	
6/16/33	1132	Chicago, Ill.	Delphi, Ind.	Beer	10,700	
6/17/33	1133	Crawfordsville, Ind.	Chicago, Ill.	Empties	16,776	
6/20/33	1134	Delphi, Ind.	Chicago, Ill.	Empties	6,160	
	3155	Columbus, O.	Ft. Wayne, Ind.	Beer	20,800	
8/ 1/33	3434	Indpls., Ind.	Chicago, Ill.	Beer	18,442	
8/ 7/33	3468	Lafayette, Ind.	Chicago, Ill.	Beer	16,800	
8/ 9/33	1452	Syracuse, Ind.	Milwaukee, Wisc.	Beer	1,300	

[fol. 766] Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Pro No.	Origin	Destination	Commodity	Quantity or Wgt.	Exception
6/3/35					
15385B	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	13800	No B/L
15386B	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	13800	No B/L
15387B	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	13800	No B/L
6/4/35					
15389B	Lawrenceburg, Ind	*Ft. Wayne, Ind	Alcoholic Liquor	5920	No B/L
15390B	Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	2663	No B/L
15391B	Lawrenceburg, Ind	*Gary, Ind	Alcoholic Liquor	10501	No B/L
15392B	Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	17400	No N/L
6/6/35					
15291B	Lawrenceburg, Ind	*Chicago, Ill	Alcoholic Liquor	18825	No B/L
15285B	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	17600	
15286B	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	17600	
15287B	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	17600	
6/10/35					
1-W	Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	4373	No B/L
6/11/35					
24-W	Lawrenceburf, Ind	Cincinnati, O	Alcoholic Liquor	19450	No B/L
266-W	Indianapolis, Ind	Chicago, Ill	Paper	17135	
6/12/35					
2-W	Lawrenceburg, Ind	*Ft. Wayne, Ind	Alcoholic Liquor	238	No Receipt
3-W	Lawrenceburg, Ind	*South Bend, Ind	Alcoholic Liquor	5207	
267-W	Indianapolis, Ind	Cincinnati, O	Bottles	12250	
6/13/35					
504-W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	16100	No B/L
506-W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	16100	No B/L
507-W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	17500	No B/L
511-W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	16950	No B/L
510-W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	19200	No Receipt
512-W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	16950	
513-W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	17500	
514-W	Lawrenceburg, Ind	*Indianapolis, Ill	Alcoholic Liquor	15430	
1148-W	Frankfort, Ky	Chicago, Ill	Alcoholic Liquor	16750	
1149-W	Frankfort, Ky	Chicago, Ill	Alcoholic Liquor	12378	
4-W	Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	5750	
13-W	Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	5460	
505-W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	16950	

* Interstate via Harrison, O.

Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Date & Pro No.	Origin	Destination	Commodity	Quantity or Weight	Exception
6/14/35					
5–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	17600	
6–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	14960	
12–W	Terre Haute, Ind	Larenceburg, Ind	Alcoholic Liquor	14520	
269–W	Chicago, Ill	Indianapolis, Ind	Meat	3162	
[fol. 767]					
6/15/35					
273–W	Chicago, Ill	Indianapolis, Ind	Meat	20061	
519–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	16100	
520–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	14515	
521–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	135	
522–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	16100	
17–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	21600	
18–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	19350	
6/17/35					
523–W	Lawrenceburg, Ind	Cincinnati, O	Alcoholic Liquor	20000	
524–W	Lawrenceburg, Ind	Cincinnati, O	Alcoholic Liquor	19278	
28–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	20250	
29–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	18000	
51–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	19350	
52–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	18000	
6/18/35					
525–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	14725	No Receipt
526–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	16375	No B/L
527–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	18825	No Receipt
528–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	15677	No Receipt
6/19/35					
531	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	21500	
532	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	22575	
42–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	19350	
45–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	30 Barrels	
47–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	18000	
48–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	19350	
6/20/35					

6/20/35					
59–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	18000	
60–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	19800	
61–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	19350	
62–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	20250	
63–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	18000	
64–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	20250	
65–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	19800	
66–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	21600	
67–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	16200	
68–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	17100	
69–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	16200	
70–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	18450	
272–W	Indianapolis, Ind	Aurora, Illinois	Paper	19515	
534–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	13800	No Receipt
[fol. 768]					
6/21/35					
83–W	*Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	3526	
536–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	18156	
537–W	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	14595	
72–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	18000	
6/22/35					
85–W	Terre Haute, Ind	*Lawrenceburg, Ind	Alcoholic Liquor	20250	
86–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	17180	
87–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	20700	
88–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	19350	
96–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	19800	
538–W	Lawrenceburg, Ind	Chicago, Illinois	Alcoholic Liquor	16100	No B/L
539–W	Lawrenceburg, Ind	Chicago, Illinois	Alcoholic Liquor	16950	No B/L
540–W	Lawrenceburg, Ind	Chicago, Illinois	Alcoholic Liquor	16100	No B/L
541–W	Lawrenceburg, Ind	Chicago, Illinois	Alcoholic Liquor	16100	
6/24/35					
554–W	Lawrenceburg, Ind	Cincinnati, Ohio	Alcoholic Liquor	20088	No B/L
555–W	Lawrenceburg, Ind	Cincinnati, Ohio	Alcoholic Liquor	19096	No B/L
556–W	Lawrenceburg, Ind	Cincinnati, Ohio	Alcoholic Liquor	6210	No B/L
557–W	Lawrenceburg, Ind	Cincinnati, Ohio	Alcoholic Liquor	14125	No B/L
558–W	Lawrenceburg, Ind	Cincinnati, Ohio	Alcoholic Liquor	20000	
97–W	Lawrenceburg, Ind	Terre Haute, Ind	Alcoholic Liquor	5344	
153–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	19800	

* Interstate via Harrison, O.

Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Date & Pro No.	Origin	Destination	Commodity	Quantity or Wgt.	Exception
6/25/35					
573	Lawrenceburg, Ind	Cincinnati, Ohio	Alcoholic Liquor	14575	No B/L
574	Lawrenceburg, Ind	Cincinnati, Ohio	Alcoholic Liquor	18538	No B/L
6/26/35					
580–W	Lawrenceburg, Ind	Terre Haute, Ind	Bottles	360	
581–W	Lawrenceburg, Ind	Terre Haute, Ind	Bottles	429 Cartons	
582–W	Lawrenceburg, Ind	Terre Haute, Ind	Bottles	16200	
583–W	Lawrenceburg, Ind	Terre Haute, Ind	Bottles	1 Load	
584–W	Lawrenceburg, Ind	Terre Haute, Ind	Bottles	1 Load	
585–W	Lawrenceburg, Ind	Terre Haute, Ind	Bottles	1 Load	
586–W	Lawrenceburg, Ind	Terre Haute, Ind	Bottles	1 Load	
587–W	Lawrenceburg, Ind	Terre Haute, Ind	Alcoholic Liquor	83108	
180–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	17100	
181–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	18000	
182–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	17550	
183–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	18900	
184–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	18000	
185–W	Terre Haute, Ind	Lawrenceburg, Ind	Alcoholic Liquor	18000	
6/27/35					
196–W	Terre Haute, Ind	[illegible]	[illegible]	[illegible]	

6/27/35					
196–W	Terre Haute, Ind.	*Lawrenceburg, Ind.	Alcoholic Liquor	19350	
197–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	18900	
198–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	19600	
199–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	19350	
277–W	Indianapolis, Ind.	Cincinnati, Ohio.	Bottles	12589	
[fol. 769]					
6/28/35					
588–W	Lawrenceburg, Ind.	Chicago, Ill.	Alcoholic Liquor	17500	
589–W	Lawrenceburg, Ind.	Chicago, Ill.	Alcoholic Liquor	7500	No Receipt
590–W	Lawrenceburg, Ind.	Chicago, Ill.	Alcoholic Liquor	9600	
7/1/35					
130–W	Terre Haute, Ind.	*Lawrenceburg, Ind.	Alcoholic Liquor	19300	
131–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	19800	
132–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	17100	
133–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	18000	
134–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	21150	
135–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	18000	
136–W	Terre Haute, Ind.	Lawrenceburg, Ind.	Alcoholic Liquor	19600	
146–W	Lawrenceburg, Ind.	*Indianapolis, Ind.	Alcoholic Liquor	258	
200–W	Terre Haute, Ind.	*Lawrenceburg, Ind.	Alcoholic Liquor	19350	
200–W	Terre Haute, Ind.	*Lawrenceburg, Ind.	Alcoholic Liquor	19350	
141–W	Indianapolis, Ind.	Cincinnati, Ohio.	Canned Goods	5950	
206–W	Indianapolis, Ind.	Cincinnati, Ohio.	Canned Goods	11550	

* Interstate via Harrison, O.

Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Date & Pro No.	Origin	Destination	Commodity	Quantity or Wgt.	Exception
[fol. 770]					
1/5/37 6910-W	Indianapolis, Ind	*Lawrenceburg, Ind	Bottles	10271	
1/7/37 54	Lawrenceburg, Ind	St. Louis, Mo	Alcoholic Liquor	18994	
1/8/37 3522-W	Indianapolis, Ind	*Lawrenceburg, Ind	Bottles	14311	
1/13/37 67	Lawrenceburg, Ind	Springfield, Ill	Alcoholic Liquor	20681	
1/15/37 30	Lawrenceburg, Ind	Canton, Ohio	Alcoholic Liquor	22925	
1/18/37 4994-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	18810	
1/27/37 6619-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	19000	
2/4/37 6903-W	Indianapolis, Ind	*Lawrenceburg, Ind	Bottles	14170	
2/9/37 49	Lawrenceburg, Ind	Danville, Ill	Alcoholic Liquor	15880	
50	Lawrenceburg, Ind	Peoria, Ill	Alcoholic Liquor	32150	
2/12/37 171	Lawrenceburg, Ind	Waukegan, Ill	Alcoholic Liquor	20431	
2/13/37 188	Lawrenceburg, Ind	Moline, Ill	Alcoholic Liquor	20776	
2/18/37 6996-W	Tipton, Ind	Chicago, Ill	Canned Goods	20010	
2/19/37 621	Lawrenceburg, Ind	Decatur, Ill	Alcoholic Liquor	15803	
2/25/37 638	Lawrenceburg, Ind	Joliet, Ill	Alcoholic Liquor	5199	
3/2/37 644	Lawrenceburg, Ind	Champaign, Ill	Alcoholic Liquor	15207	
3/24/37 4902-W	Frankfort, Kentucky	Chicago, Ill	Alcoholic Liquor	20000	
4906-W	Frankfort, Kentucky	Chicago, Ill	Alcoholic Liquor	20000	

[fol. 771]

Bd. 7731				
5/29/37				
7400-W				
4/3/37	Indianapolis, Ind	Louisville, Ky	Oleo	15000
7399-W				
4/15/37	Indianapolis, Ind	Louisville, Ky	Bottles	17200
7358-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	23721
7359-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	6037
5/1/37				
7378	Tipton, Indiana	Cincinnati, Ohio	Catsup	29925
5/22/37				
7335-W	Indianapolis, Ind	Louisville, Ky	Bottles	18374
5/24/37				
7355	Louisville, Ky	Chicago, Ill	Alcoholic Liquor	15000
5/25/37				
7288-W	Indianapolis, Ind	Lawrenceburg, Ind	Bottles	15851
5/26/37				
987	Lawrenceburg, Ind	Cleveland, Ohio	Alcoholic Liquor	30051
5/27/37				
973	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20225
5/28/37				
974	Lawrenceburg, Ind	Alton, Ill	Alcoholic Liquor	15059
6/3/37				
3554-W	Indianapolis, Ind	Chicago, Ill	Oleo	20000
6/4/37				
1752	Lawrenceburg, Ind	St. Louis, Mo	Alcoholic Liquor	14636
7295-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	18975
7296-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	28678
7297-W	Indianapolis, Ind	Louisville, Ky	Bottles	16000
7298-W	Indianapolis, Ind	Louisville, Ky	Bottles	Free Astray
6/7/37				
1756	Lawrenceburg, Ind	Toledo, Ohio	Alcoholic Liquor	29992
1755	Lawrenceburg, Ind	Columbus, Ohio	Alcoholic Liquor	30453
1753	Lawrenceburg, Ind	Cleveland, Ohio	Alcoholic Liquor	29974
1758	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	21468
1757	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20000

* Interstate via Harrison, O.

Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Date & Pro No.	Origin	Destination	Commodity	Quantity or Weight	Exception
[fol. 772]					
6/8/37					
8403-W	Indianapolis, Ind	Covington, Ky	Canned Vegetables	19969	
3557-W	Sheridan, Ind	Hamilton, Ohio	Canned Milk	18010	
8402-W	Indianapolis, Ind	Cincinnati, Ohio	Canned Vegetables	21545	
1759	Lawrenceburg, Ind	Chicago, Ill	Whiskey	33631	
6/9/37					
8407-W	Indianapolis, Ind	Chicago, Ill	Pork and Beans	20187	
8708-W	Indianapolis, Ind	Chicago, Ill	Butter	24000	
1761	Lawrenceburg, Ind	Columbus, Ohio	Alcoholic Liquor	20101	
1762	Lawrenceburg, Ind	Cleveland, Ohio	Alcoholic Liquor	21001	
1763	Lawrenceburg, Ind	Canton, Ohio	Alcoholic Liquor	24551	
1764	Lawrenceburg, Ind	Indianapolis, Ind	Alcoholic Liquor	25538	
1765	Lawrenceburg, Ind	Kewanee, Ill	Alcoholic Liquor	21000	
1767	Lawrenceburg, Ind	Waukegan, Ill	Alcoholic Liquor	15161	
6/10/37					
8410-W	Indianapolis, Ind	Chicago, Ill	Oleo	20000	
6/11/37					
1768	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	26604	
1769	Lawrenceburg, Ind	*Indiana Harbor, Ind	Alcoholic Liquor	19638	
6/14/37					
8453-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	21000	
6/15/37					
1770	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	21620	
1771	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	25075	
1772	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20000	
1773	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	49738	
8458-W	Indianapolis, Ind	Chicago, Ill	Catsup	2250	
8459-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	2500	
8461-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	1050	
8463-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	1380	
8464-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	2100	
8466-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	1430	
8467-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	2704	
8468-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	[illegible]	
[illegible]					

6/16/37					
1774	Lawrenceburg, Ind	*South Bend, Ind	Alcoholic Liquor	5115	
1775	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	29139	
1776	Lawrenceburg, Ind	Moline, Ill	Alcoholic Liquor	20408	
8412-W	Indianapolis, Ind	Chicago, Ill	Oleo	20000	
8413-W	Indianapolis, Ind	St. Louis, Mo	Canned Goods	22287	No B/L
6/17/37					
8414-W	Indianapolis, Ind	St. Louis, Mo	Canned Goods	20575	
8416-W	Indianapolis, Ind	Chicago, Ill	Oleo	20000	
[fol. 773]					
6/21/37					
1777	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20589	
8419-W	Indianapolis, Ind	Columbus, Ohio	Oleo	21000	
6/22/37					
8422-W	Indianapolis, Ind	St. Louis, Mo	Canned Goods	25679	
6/22/37					
1779	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20356	
1780	Lawrenceburg, Ind	St. Louis, Mo	Alcoholic Liquor	23125	
1781	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20248	
1782	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	24975	
6/23/37					
8472-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	19958	
1783	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	21488	
1784	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	21198	
6/24/37					
6588-W	Peru, Indiana	Chicago, Ill	Canned Goods	19200	
6589-W	Peru, Indiana	Chicago, Ill	Canned Goods	2400	
6590-W	Peru, Indiana	Chicago, Ill	Canned Goods	21600	
1785	Lawrenceburg, Ind	South Bend, Ind	Alcoholic Liquors	15000	
1786	Lawrenceburg, Ind	Gary, Indiana	Alcoholic Liquor	20541	
1787	Lawrenceburg, Ind	Decatur, Ill	Alcoholic Liquor	21007	
6/25/37					
8475-W	Indianapolis, Ind	Chicago, Ill	Paper Board	180	
8476-W	Indianapolis, Ind	Chicago, Ill	Paper Board	135	
8477-W	Indianapolis, Ind	Chicago, Ill	Paper Board	150	
8478-W	Indianapolis, Ind	Chicago, Ill	Paper Board	610	
529	Louisville, Ky	Chicago, Ill	Alcoholic Liquor	5000	
1788	Lawrenceburg, Ind	Columbus, O	Alcoholic Liquor	15800	

* Interstate via Harrison, O.

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Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Date & Pro No.	Origin	Destination	Commodity	Quantity or Wgt.	Exception
6/25/37					
1789	Lawrenceburg, Ind	Canton, O	Alcoholic Liquor	17126	
1790	Lawrenceburg, Ind	Cleveland, O	Alcoholic Liquor	18101	
1791	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	30742	
1792	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20000	
1793	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	32330	
6/26/37					
8430-W	Indianapolis, Ind	Chicago, Ill	Waste Paper Board	320	
8431-W	Indianapolis, Ind	Chicago, Ill	Waste Paper Board	215	
8436-W	Indianapolis, Ind	Chicago, Ill	Butter	36050	
8435-W	Indianapolis, Ind	Chicago, Ill	Waste Paper Board	4200	
8433-W	Indianapolis, Ind	Chicago, Ill	Waste Paper Board	2550	
8434-W	Indianapolis, Ind	Chicago, Ill	Waste Paper Board	5000	
6/28/37					
1794	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	23349	
8443-W	Indianapolis, Ind	Chicago, Ill	Paper Board	855	
8448-W	Indianapolis, Ind	Drug Pkg. Inc	Paper Board	8225	
[fol. 774]					
6/29/37					
1797	Lawrenceburg, Ind	Springfield, Ill	Alcoholic Liquor	20000	
1800	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	25335	
1802	Lawrenceburg, Ind	St. Louis, Mo	Alcoholic Liquor	14813	
6916	Frankfort, Ky	Chicago, Ill	Alcoholic Liquor	24463	
6/30/37					
1803	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20059	
7/8/37					
7443-W	Indianapolis, Ind	Chicago, Ill	Canned Juice	22950	
7/15/37					
6896-W	Chicago, Ill	Anderson, Ind	Meat	6448	
6895-W	Chicago, Ill	Anderson, Ind	Meat	2422	
6898-W	Chicago, Ill	Indianapolis, Ind	Meat	18210	
7/20/37					
6835-W	Chicago, Ill	Indianapolis, Ind	Soap	3100	

7/21/37				
8874–W	Indianapolis, Ind	Chicago, Ill	Canned Soup	23750
7/22/37				
8215–W	Chicago, Ill	Indianapolis, Ind	Meat	259
7/27/37				
7462–W	Indianapolis, Ind	Chicago, Ill	Juice	23000
8/4/37				
8125–W	Chicago, Ill	Anderson, Ind	Pork and Beans	1990
8/9/37				
8654–W	Indianapolis, Ind	Louisville, Ky	Waste Paper Board	1125
8/10/37				
8544–W	Chicago, Ill	Indianapolis, Ind	Meat	714
8/26/37				
9233–W	Chicago, Ill	Anderson, Ind	Meat	404
9/2/37				
1559	Lawrenceburg, Ind	Toledo, Ohio	Alcoholic Liquor	30050
9/4/37				
1633	Lawrenceburg, Ind	Alton, Ill	Alcoholic Liquor	5000
9/13/37				
1584	Lawrenceburg, Ind	Aurora, Ill	Alcoholic Liquor	15000
[fol. 775]				
9/14/37				
9479–W	Tipton, Indiana	Joliet, Ill	Canned Goods	13859
9/15/37				
9475–W	Chicago, Ill	Muncie, Ind	Eggs	8750
1594	Lawrenceburg, Ind	Kewanee, Ill	Alcoholic Liquor	20465
9/20/37				
1257	Louisville, Ky	Chicago, Ill	Alcoholic Liquor	71575
9/21/37				
530	Louisville, Ky	Chicago, Ill	Alcoholic Liquor	5213
9/22/37				
1658	Lawrenceburg, Ind	Danville, Ill	Alcoholic Liquor	19297
10/8/37				
425	Cincinnati, Ohio	Indianapolis, Ind	Alcoholic Liquor	5425
10/26/37				
503	Cincinnati, Ohio	Indianapolis, Ind	Alcoholic Liquor	5596

* Interstate via Harrison, O.

Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Date & Pro No.	Origin	Destination	Commodity	Quantity or Weight	Exception
11/1/37 8315-W	Indianapolis, Ind	Chicago, Ill	Paper Board	4180	
11/2/37 8319-W	Indianapolis, Ind	Chicago, Ill	Paper Board	14765	
11/5/37 550 [fol. 776]	Louisville, Ky	Chicago, Ill	Alcoholic Liquor	24017	
1/25/38 5342	Lawrenceburg, Ind	Columbus, Ohio	Alcoholic Liquor	15000	
2/14/38 5372	Lawrenceburg, Ind	St. Louis, Mo	Alcoholic Liquor	16997	
2/25/38 5518	Lawrenceburg, Ind	St. Louis, Mo	Alcoholic Liquor	17791	
3/28/38 5581	Lawrenceburg, Ind	Columbus, Ohio	Alcoholic Liquor	35377	
3/28/38 5582	Lawrenceburg, Ind	Toledo, Ohio	Alcoholic Liquor	21025	
4/1/38 5599	Lawrenceburg, Ind	Columbus, Ohio	Alcoholic Liquor	31992	
5600	Lawrenceburg, Ind	Toledo, Ohio	Alcoholic Liquor	25737	
4/5/38 5717	Lawrenceburg, Ind	E. St. Louis, Ill	Alcoholic Liquor	19876	
4/9/38 5731	Lawrenceburg, Ind	E. St. Louis, Ill	Alcoholic Liquor	15147	
4/21/38 5751	Lawrenceburg, Ind	Quincy, Ill	Alcoholic Liquor	16041	
4/22/38 5630	Lawrenceburg, Ind	Herrin, Ill	Alcoholic Liquor	6559	
4/28/38 5763	Lawrenceburg, Ind	St. Louis, Mo	Alcoholic Liquor	20780	
5/7/38 5780	Lawrenceburg, Ind	Peoria, Ill	Alcoholic Liquor	15000	

8/1/38 14607-W	Indianapolis, Ind	Louisville, Ky	Paper Board	3135	

8/1/38				
14607–W	Indianapolis, Ind	Louisville, Ky	Paper Board	3135
14608–W	Indianapolis, Ind	Chicago, Ill	Paper Board	32800
14610–W	Indianapolis, Ind	Chicago, Ill	Paper Board	4045
16474–W	Chicago, Ill	Indianapolis, Ind	Package Products	7088
16475–W	Chicago, Ill	Indianapolis, Ind	Package Products	11220
8/2/38				
14630–W	Indianapolis, Ind	Chicago, Ill	Paper Board	8330
14631–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2110
16478–W	Chicago, Ill	Indianapolis, Ind	Pickles	30800
8/3/38				
14639–W	Indianapolis, Ind	Chicago, Ill	Paper Board	5430
14642–W	Indianapolis, Ind	Chicago, Ill	Paper Board	5970
16489–W	Chicago, Illinois	Indianapolis, Ind	Package Products	15745
[fol. 777]				
8/4/38				
14457–W	Indianapolis, Ind	Chicago, Ill	Paper Board	5200
6033	Lawrenceburg, Ind	Decatur, Ill	Alcoholic Liquor	15940
16494–W	Chicago, Ill	Indianapolis, Ind	Package Products	20938
8/6/38				
6035	Lawrenceburg, Ind	Edwardsville, Ill	Alcoholic Liquor	16688
14469–W	Greenwood, Ind	Cincinnati, Ohio	Canned Goods	3935
14470–W	Indianapolis, Ind	Cincinnati, Ohio	Canned Goods	17728
14476–W	Sheridan, Ind	Louisville, Ky	Evaporated Milk	83160
8/9/38				
14485–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2225
18514–W	Chicago, Ill	Indianapolis, Ind	Package Products	10692
8/10/38				
14872–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2485
14876–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2250
5898	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20152
5899	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20416
6039	Lawrenceburg, Ind	Moline, Ill	Alcoholic Liquor	15541
8/11/38				
18528–W	Chicago, Ill	Indianapolis, Ind	Package Products	11469
14880–W	Indianapolis, Ind	Chicago, Ill	Oleo	27825

* Interstate via Harrison, O.

Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Date & Pro No.	Origin	Destination	Commodity	Quantity or Wgt.	Exception
8/11/38					
14887-W	Indianapolis, Ind	Chicago, Ill	Paper Board	2750	
14888-W	Indianapolis, Ind	Chicago, Ill	Paper Board	4530	
5900	Lawrenceburg, Ind	Indianapolis, Ind	Alcoholic Liquor	17051	
5901	Lawrenceburg, Ind	Indianapolis, Ind	Alcoholic Liquor	20053	
5902	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20613	
5903	Lawrenceburg, Ind	Moline, Ill	Alcoholic Liquor	19495	
5904	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	21525	
5905	Lawrenceburg, Ind	Shawnee, Ill	Alcoholic Liquor	21111	
6040	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20546	
6041	Lawrenceburg, Ind	Waukegan, Ill	Alcoholic Liquor	8000	
6042	Lawrenceburg, Ind	*Gary, Indiana	Alcoholic Liquor	15537	
18529-W	Chicago, Ill	Indianapolis, Ind	Pickles	27867	
8/12/38					
14894-W	Indianapolis, Ind	Louisville, Ky	Oleo	10600	
6044	Lawrenceburg, Ind	Metropolis, Ill	Alcoholic Liquor	21087	
8/13/38					
14859-W	Indianapolis, Ind	Chicago, Ill	Paper Board	11905	
6046	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	20000	
6047	Lawrenceburg, Ind	Evansville, Ind	Alcoholic Liquor	15000	
6048	Lawrenceburg, Ind	South Bend, Ind	Alcoholic Liquor	15996	
14863-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	6390	
14857-W	Sheridan, Ind	Louisville, Ky	Evaporated Milk	20540	
8/15/38					
5909	Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	6625	
5910	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	27208	
14870-W [fol. 778]	Indianapolis, Ind	Chicago, Ill	Paper Board	11260	
8/15/38					
14871-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	4975	
14872-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	4420	
14874-W	Indianapolis, Ind	Chicago, Ill	Canned Soups	8403	
14873-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	1470	
[illegible]	[illegible]	[illegible]	[illegible]	1879	

14677–W	Indianapolis, Ind	Chicago, Ill	Paper Board	10645
14679–W	Indianapolis, Ind	Chicago, Ill	Paper Board	1110
14684–W	Indianapolis, Ind	Chicago, Ill	Paper Board	1005
18543–W	Chicago, Ill	Indianapolis, Ind	Package Products	20483
8/16/38				
5911	Lawrenceburg, Ind	*South Bend, Ind	Alcoholic Liquor	15000
5912	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	22438
5913	Lawrenceburg, Ind	*Ind. Harbor, Ind	Alcoholic Liquor	20609
18548–W	Chicago, Ill	Indianapolis, Ind	Package Products	12663
8/17/38				
18553–W	Chicago, Ill	Indianapolis, Ind	Package Products	17236
14895–W	Indianapolis, Ind	Chicago, Ill	Paper Board	6495
14897–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2385
6049	Lawrenceburg, Ind	Alton, Ill	Alcoholic Liquor	21762
8/18/38				
18563–W	Chicago, Ill	Indianapolis, Ind	Package Products	18929
15452–W	Indianapolis, Ind	Chicago, Ill	Paper Board	420
6050	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	33340
15453–W	Indianapolis, Ind	Chicago, Ill	Paper Board	3070
15455–W	Indianapolis, Ind	Chicago, Ill	Paper Board	6035
5918 k/19	Lawrenceburg, Ind	Elgin, Ill	Alcoholic Liquor	16412
8/19/38				
14694–W	Elwood, Ind	Cincinnati, O	Tomato Juice	18672*
14698–W	Indianapolis, Ind	Louisville, Ky	Paper Board	3980
8/20/38				
15463–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2370
15465–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2180
14707–W	Indianapolis, Ind	Louisville, Ky	Paper Board	2305
14712–W	Indianapolis, Ind	Cincinnati, O	Canned Goods	1213
15458–W	Sheridan, Ind	Louisville, Ky	Evaporated Milk	39955
8/22/38				
18577–W	Chicago, Ill	Indianapolis, Ind	Meat	2584
11045–W	Indianapolis, Ind	Louisville, Ky	Paper Board	1410
18566–W	Chicago, Ill	Indianapolis, Ind	Pickles	21812
8/23/38				
14715–W	Indianapolis, Ind	Chicago, Ill	Paper Board	3180
14719–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2010

* Interstate via Harrison, O.

Analysis of Shipments Hauled by Ziffrin, Incorporated. MC 2511

Date & Pro No.	Origin	Destination	Commodity	Quantity or Wgt.	Exception
[fol. 779]					
8/24/38					
5920	Lawrenceburg, Ind	Elgin, Ill	Alcoholic Liquor	15000	
14723-W	Indianapolis, Ind	Chicago, Ill	Paper Board	2695	
14727-W	Greenwood, Ind	Chicago, Ill	Catsup	21138	
8/25/38					
14647-W	Indianapolis, Ind	Chicago, Ill	Oleo	25175	
15466-W	Indianapolis, Ind	Cincinnati, O	Canned Goods	17997	
18587-W	Chicago, Ill	Indianapolis, Ind	Package Products	11414	
8/26/38					
5927	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	22376	
5928	Lawrenceburg, Ind	Cairo, Ill	Alcoholic Liquor	21025	
5929	Lawrenceburg, Ind	Cairo, Ill	Alcoholic Liquor	19805	
5930	Lawrenceburg, Ind	Metropolis, Ill	Alcoholic Liquor	16488	
5931	Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	10000	
14746-W	Greenwood, Ind	Chicago, Ill	Canned Tomatoes	18750	
6057	Lawrenceburg, Ind	Quincy, Ill	Alcoholic Liquor	20889	
6058	Lawrenceburg, Ind	*Indianapolis, Ind	Alcoholic Liquor	15711	
8/27/38					
6059	Lawrenceburg, Ind	*East Chicago, Ind	Alcoholic Liquor	20520	
14650-W	Indianapolis, Ind	Cincinnati, O	Canned Goods	3800	
5932	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	14230	
15468-W	Sheridan, Ind	Louisville, Ky	Evaporated Milk	20000	
8/29/38					
14496-W	Whiteland, Ind	Chicago, Ill	Tomato Juice	22500	
14495-W	Indianapolis, Ind	Chicago, Ill	Canned Goods	1225	
15471-W	Indianapolis, Ind	Chicago, Ill	Waste Paper Board	3140	
8/30/38					
6060	Lawrenceburg, Ind	*South Bend, Ind	Alcoholic Liquor	15470	
6062	Lawrenceburg, Ind	*Gary, Indiana	Alcoholic Liquor	15462	
5935	Lawrenceburg, Ind	*Gary, Indiana	Alcoholic Liquor	7844	
5936	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	29138	
5937	Lawrenceburg, Ind	Gary, Indiana	Alcoholic Liquor	20145	
8/31/38					
14691-W	Whiteland, Ind	Chicago, Ill	Tomato Juice	19975	
[illegible]	[illegible]	[illegible]	Paper Board	2870	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	

15066–W	Indianapolis, Ind	Chicago, Ill	Paper Board	5335	
15068–W	Indianapolis, Ind	Chicago, Ill	Paper Board	2435	
15069–W	Indianapolis, Ind	Chicago, Ill	Paper Board	1225	
15072–W	Whiteland, Ind	Chicago, Ill	Tomato Juice	6975	
8/30/38					
18654–W	Chicago, Ill	Indianapolis, Ind	Package Products	16701	
18655–W	Chicago, Ill	Indianapolis, Ind	Package Products	2857	
18656–W	Chicago, Ill	Indianapolis, Ind	Package Products	4854	
18657–W	Chicago, Ill	Indianapolis, Ind	Meats	2422	
[fols. 780–781]					
8/31/38					
18659–W	Chicago, Ill	Indianapolis, Ind	Package Products	15893	
18660–W	Chicago, Ill	Indianapolis, Ind	Package Products	1223	
5939	Lawrenceburg, Ind	Galesburg, Ill	Alcoholic Liquor	19221	
5940	Lawrenceburg, Ind	Kewanee, Ill	Alcoholic Liquor	20709	
5941	Lawrenceburg, Ind	Moline, Ill	Alcoholic Liquor	19853	
5943	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	33325	
5944	Lawrenceburg, Ind	Chicago, Ill	Alcoholic Liquor	15557	
9/22/38					
18643–W	Chicago, Ill	Indianapolis, Ind	Pickles	25237	
9/28/38					
18720–W	Indianapolis, Ind	Chicago, Ill	Batteries	50 ctns.	No B/L
9/29/38					
18737–W	Chicago, Ill	Louisville, Ky	Pickles	12725	
18738–W	Chicago, Ill	Cincinnati, Ohio	Chocolate Ctg	20000	No B/L
10/1/38					
17887–W	Indianapolis, Ind	Chicago, Ill	Batteries	75 cts.	No B/L
17888–W	Indianapolis, Ind	Chicago, Ill	Batteries	170 cts.	No B/L
10/4/38					
18772–W	Chicago, Ill	Indianapolis, Ind	Refg. Pts	20000	
10/7/38					
18833–W	Chicago, Ill	Cincinnati, Ohio	Package Products	16656	
10/10/38					
18874–W	Chicago, Ill	Indianapolis, Ind	Refg. Pts	20000	
18876–W	Chicago, Ill	Cincinnati, Ohio	Choc. Ctg	20000	
18877–W	Chicago, Ill	Cincinnati, Ohio	Feed Meat	21035	
18878–W	Chicago, Ill	Indianapolis, Ind	Refg. Pts	20000	

* Interstate via Harrison, O.

[fols. 782-783] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC 2511

In the Matter of APPLICATION OF ZIFFRIN, INCORPORATED, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY OR PERMIT (Form BMC 1) AUTHORIZING OPERATION AS A COMMON OR CONTRACT CARRIER BY MOTOR VEHICLE

Hearing Room "B", I. C. C. Building, Washington, D. C.
Friday, October 27th, 1939

The above-entitled matter came on for oral argument before the Commission (Division No. 5) at 10:00 o'clock A. M.

Present: Commrs. Lee (Presiding), Rogers and Alldredge.

Appearances:

Howell Ellis, 520 Illinois Building, Indianapolis, Indiana, appearing for Applicant.

Floyd F. Shields, 221 West Roosevelt Road, Chicago, Illinois, appearing for Keeshin Motor Express Company, Inc., Keeshin Motor Express, Incorporated, and Keeshin Motor Freight, Inc.

B. W. LaTourette, 314 North Broadway, St. Louis, Missouri, appearing for American Trucking Association, Inc., Common Carrier Division and Anderson Motor Service, et al.

[fol. 784] Proceedings

Commr. Lee: Division 5 will hear argument in Docket MC 2511, Ziffrin, Inc., and will call for argument of Mr. Ellis.

Argument of Mr. Ellis

Mr. Ellis: May it please the Commission, I appear for the Applicant, Ziffrin, Incorporated, in this matter. I may say that we really have two cases here, one the grandfather clause rights of the Applicant, a case which we instituted by filing our application and second, an investigation into alleged relationship between the Applicant and another company, Ziffrin Truck Lines Incorporated, which your Com-

mission instituted under rather peculiar circumstances to which reference will be made later.

In view of the rather wide scope of this matter, in fact, there being two cases, in the time which we have allotted it is going to be *aiddi*cult to do anything more than to get the high spots of this matter before the Division, and I therefore earnestly request, as far as the Applicant is concerned, that our brief and our exceptions to the Examiner's Report also receive your serious consideration.

Commr. Lee: They would receive that without your requesting us to do it.

Mr. Ellis: Yes, sir.

Now, in the first place, I want to go through a brief chronological review of this case, because I think it is [fol. 785] rather important.

This is an application under the grandfather clause for a contract carrier, Ziffrin, Incorporated, of Indianapolis, Indiana, to continue the transportation under contract in a certain territory as set out in the application and later lessened by amendment at the time of the hearing.

The application was referred in the first instance, to your District Supervisor Snodgrass at Indianapolis, at which time the Applicant came in with voluminous documentary evidence, submitted everything to him that he requested and entered into an agreement with him, signed, in writing, and which is in evidence in this case, to except certain territory and certain commodities. Thereafter, certain petitions were filed before this Commission requesting that that compliance order be stayed and that formal hearing be had in this matter. I desire to call particular attention to two of those petitions.

Judge Lee and Commissioner Rogers, perhaps, will recall that this is not the first time that I have mentioned a matter of this kind in argument before this Commission, but I deem it of considerable importance. I am now reading from one of the petitions that caused this hearing, caused this argument, caused taking all the time and trouble with the parties and the Commission and here is what they said and then I am going to tell you what they did.

They said: "Verified under oath. "Your petitioner fur-[fol. 786] ther states and can establish by competent evidence that the Applicant herein was not conducting operations as a contract carrier either to or from St. Louis,

Missouri, on July 1, 1935, and has not so operated since this time contrary to the findings of the Commission in this case." They said they had competent evidence and asked for a hearing to bring it in. They didn't bring in, may it please the Division, one word of evidence in support of that petition. But that is not all. Here's really a petition. This purports to be for about 15 or 20 companies and they all signed it and they all verified it under oath, swore to it, may it please the Division, and what did they say? "Your petitioners state that they can establish by competent evidence, if given an opportunity to be heard, that the Applicant was not in bona fide operation as a contract carrier over irregular routes herein set forth on July 1, 1935. That was verified under oath by about 15 people. They did not bring in one single bit of evidence. What became of it, may it please the Commission? Mr. Axelrod, the attorney who was principal in filing this document isn't here today. He asked for some time. I wanted to challenge him to tell this Division why he filed this document, and why he caused this hearing to be held.

Mr. Shields is here and he is a party to it and I suggest that he tell you what he had in his mind when his clients swore under oath that they had evidence and if given an opportunity to be heard they would bring it in, and as far [fol. 787] as his client is concerned they didn't even enter an appearance in the hearing. They didn't even come to the hearing. How they got into the case and back into it later on again——

Commr. Rogers: There wasn't anything wrong about going to a hearing on this case, was there?

Mr. Ellis: There was nothing wrong about it, Commissioner Rogers, except that we had submitted our proof in the way that the Division had outlined through your District Supervisor, had agreed to accept less than we were entitled to, and thought the matter was disposed of, and yet, by verified petitions under oath we have put to a proceedings here running over a period of more than a year. So much for that. I think it is a matter of some importance, perhaps I may be in error about that.

The Commission, as a result of these petitions on the 4th day of June, 1938, entered an order vacating and setting aside the compliance order, and on June 23rd you made an order setting this case down for hearing. The hearing was postponed from July 29th to September 12th

and 13th, 1938, before Examiner Lawton, in the city of Indianapolis. The notice which was issued was double-barrelled. It ordered a hearing in the grandfather clause case and that's the part of the case that I am going to first direct my remarks to, and second, it ordered an investigation or a purported investigation into certain alleged relationships under sections of the statute which do not apply as I shall presently point out.

[fol. 788] At the time of hearing we amended our application lessening the territory which we claim and which I have set out in an exhibit and in the interest of time I will not read what that territory is, it is in the record and I have it in the documentary form. Following the hearing, at the suggestion and request of the Examiner, we submitted documentary evidence, thereafter the Examiner filed his report, there were briefs and so forth, exceptions to the report had been filed both by the Applicant and other parties, and then, after that was all over this company, The Keeshin Company, that filed one of the original petitions, to have this thing set down for hearing, that didn't show up for the hearing, filed a petition down here for leave to intervene and said they had new and undiscovered evidence, as far as this record is concerned, the first evidence that they claimed to have is still new and undiscovered.

Now, that's the history of this case. At the time of the hearing we divided the matter—by agreement of everybody—into two sections, one we talked about and discussed the grandfather clause case and evidence applicable to that and then the second matter.

As to the grandfather clause case evidence it showed that we had operated as a contract carrier in interstate commerce since 1933, when this company was incorporated and began its operation.

We brought in, in support of that, the testimony of the following witnesses: Mr. Chandler, the General Traffic [fol. 789] Manager of the Franklyn Distilleries who testified that he had used our service on, before and continuously since July 1, 1935. He is a practitioner before this Commission. Mr. Edgar Gusky of New York City, the General Traffic Manager of Schenley Distillers who testified that he had used our service on, before and continuously since July 1, 1935. Mr. F. F. Gilbert, the Assistant Traffic Manager of Swift & Company, who testified in the same manner. Mr. P. E. Percy, Chicago, Illinois, General Traffic Manager

of the Kraft Phenix Cheese Company, similar testimony. Mr. H. E. Rumrill, General Traffic Manager of the Standard Nut Margarene Company, who testified and brought in his own records and gave the pro numbers of shipments that we had handled on, before and since July, 1935. Similar testimony from Mr. Angell, the General Traffic Manager of Stokley Brothers. Throughout this hearing the Examiner indicated that he wouldn't even let us put in that evidence unless we agreed to submit documentary proof. Now, I believe this Commission, at least some of the members of this Division, are familiar with the fact that I was one of the first persons, at least, I believe, in a case to come down here and point out the necessity of documentary proof. We brought in our documentary proof to the District Supervisor and thereafter it was all destroyed under circumstances which I will outline in a moment. We didn't bring it in to this hearing because we couldn't bring it in. We did bring in, at the insistence of the Examiner, other documentary evidence after the hearing and we supported [fol. 790] it by affidavits, one being the affidavit of your District Supervisor, Mr. Snodgrass, who testified or swore under oath in an affidavit, that we had brought in our original records in the first instance, that he had seen them, that they were sufficient to warrant the claims that we made at that time and which he allowed in the compliance order, and that the record that we now had was something different. We supported that by the affidavit of Mr. Ziffrin, the president of this company, explaining the circumstances under which our documentary proof between the time we brought it in to the District Supervisor and the time that this hearing was ordered, was dissipated. We were camped out on a lot down there and our stuff was in trailers due to some Acts of God that it is not necessary to go into here, they are set out in the affidavits, and we had to go out and search in a lot for this documentary evidence through trailers where it had been thrown in by workmen. We did the best job we could and we brought in what we could. The Examiner said that he was going to ignore this affidavit of your man, Mr. Snodgrass and Mr. Ziffrin, because it was not proper evidence. We didn't submit it as evidence. Bringing in this documentary proof after the hearing was over wasn't proper procedure. Certainly, when we were required to do that we had a right and we believe this Com-

mission could give attention to the affidavits that we brought in supporting it.

The documentary proof which we digested——

[fol. 791] Commr. Lee: Was there objection made to the introduction of those affidavits?

Mr. Ellis: The affidavits were submitted, your Honor, with this digest of documentary proof.

Commr. Lee: I asked you if there was any objection made to their introduction?

Mr. Ellis: They were not produced at the time of the hearing, Judge Lee, I am talking now about proceedings that went on after the hearing at the insistence of the Examiner. We relied on the testimony of these witnesses that I have told you about, most of them Registered Practitioners before this Commission whose integrity, I think at least is established by that fact, who swore under oath what we were doing, but the Examiner said he wouldn't even let them testify if we didn't agree that we had been bringing in documentary proof and the documentary proof had been destroyed. But we had some left anyway, and we did make, I think, under all the circumstances, a reasonable showing on the question of documentary evidence. We brought with that, or sent with that, when we forwarded it down here to the Commission, the affidavit of your District Supervisor stating that he had seen and had personally examined all our documentary proof and that it sustained our contentions. As a result of this order the Examiner made certain findings as to territory and commodities and in discussing [fol. 792] the proposition he used this language: He said: "While the testimony" and that's the testimony of these shippers that I told you about, "is entitled to weight".,— I am quoting the Examiner now—"in establishing the general nature of Applicant's business on and prior to the statutory date, in view of the opposition to the application, such testimony cannot be considered as definitely indicating the scope of the authority under which applicant is entitled".

Now, this is the first time I ever knew that the weight to be given to evidence and the testimony of witness was to be determined by the number of the opposition. I submit, Gentlemen of the Commission, that if the testimony was false it should be given no weight if there was no opposition, and further I submit that if the testimony was true

and it is uncontradicted because they didn't put in any evidence at all on our grandfather clause proposition; if the testimony is true it is entitled to proper weight and consideration regardless of the number of the opposition or who they were. That is our position, at least, and we think it is legally sound.

Now, as I said, there are two phases of this case and I must hurry on to that. I have had handed to the Bench and counsel, if they so desire, may obtain from the Clerk with whom I have left other copies, a brief summary, a document showing on page 1 the following:

In the first column the territory as amended which we [fol. 793] claim. Now, it says commodities generally. That was our position then, that's our position now. In view of the decision in the Keystone Case I do not care to discuss the legal phases of what a contract carrier is entitled to haul, commodities or certain special commodities. This particular Applicant intervened in the Keystone Case. I delivered an argument for whatever it might have been worth before the Commission in support of our position in the Keystone Case and we filed a brief. We have not receded from our position. We stand firmly on it, but I set out here in this exhibit in Column 1, commodities generally, simply because that's the way the application read and because that's our position and our claim here. The Commission, if I interpret the decision in my hurried reading of it yesterday, aright, perhaps has reached another conclusion. However, that is not the particular matter for preparing the exhibits. The second column A to E inclusive, shows all the commodities and all the territory which the Examiner's Report allows us. In the third column with letters corresponding to the Examiner's finding, I have set out the testimony in the record undisputed, uncontradicted supporting our claim to the territory set out in the first column.

I desire to call attention to just *how* things in connection with this exhibit. First, it is alcoholic liquor and beverages. We were organized for the purpose of transporting those. We were the first company in the United States to transport whisky, and yet, although the traffic managers [fol. 794] of these distilleries that have used our service, under contract, testified as to where they had used it, the Examiner refused to allow us the territory.

Commr. Lee: Do I understand now that these traffic managers appeared there at the hearing and testified orally?

Mr. Ellis: Yes, sir. But I had a very difficult time, Judge Lee, in getting their testimony in the record, and I was only permitted to do it, when I said I would bring in this other document after the hearing, when we didn't propose to rely on it and don't rely on it now, and it is the best we could do under the circumstances which are fully set out in the affidavit supporting it.

Commr. Alldredge: Do you mean the Examiner declined to permit oral testimony?

Mr. Ellis: When I had a traffic manager on the witness stand your Honor and asked him the question: What points were you using the Applicant on, before and about July 1, 1935, there was an objection time and time again by Mr. LaTourette, my distinguished friend from St. Louis here, and the Examiner said: "I will only permit your testimony if you agree to bring in documentary proof."

Commr. Alldredge: Now, on what ground was the objection based?

Mr. Ellis: The objection was based on the ground that it wasn't the best evidence and that documentary proof is the only way to prove grandfather clause rights. We submit [fol. 795] that that's not the law and that's not the fact, and when our documentary proof which you saw once—and we have an affidavit that you- man did see it—had been destroyed, we submit that the testimony of these shippers was the best evidence.

Now, I want to call attention to just one other item on this exhibit here and that refers to the Stokely matter. We were given there, as you can see, Indianapolis and two points. Mr. Angell—he is a Registered Practitioner here—is Traffic Manager of one of the biggest food companies in this country. Stokely sells tomato juice, canned goods and so forth all over the United States. He testified, and it is a fact because I live out there, I happen to know that he is right about this—that there were about 15 canning plants in Indiana that they had that they used Ziffrin, Incorporated to haul from, and yet we were not allowed to haul from a single one of them.

Now, hurriedly turning to the second page, I want to call your attention to what I have attempted to develop there. In the first column are all of the commodities that we were hauling on July 1, 1935. In the second column it shows those commodities which he granted us, and it shows

those which were denied. In the third column is the reference to the record in support of those matters which be denied us. I want to call attention to only one. He denied us the right to handle those oleomargarine and dairy products. Witness Rumrill the Traffic Manager came in and testified about it, and brought his own documentary evi-
[fol. 796] dence, may it please the Commission. Our records, weren't available, he brought them in. The pro numbers of the shipments, the destination, typical evidence from his files as to what we were doing on and before and since July 1, 1935 for him, and the Examiner disallowed it altogether. We submit that on this record we have established our grandfather clause rights to the commodities set out in this exhibit and in that territory regardless of what interpretation may be placed upon the fact as to whether or not a contract carrier can handle commodities generally. I desire now to direct my attention to the second phase of this case, towit, the alleged corporate relationship between this company and another company.

Commr. Rogers: Isn't there a question of dual operation here?

Mr. Ellis: Yes, sir, that's a good way to express it, Mr. Commissioner Rogers, but that isn't what Division 5 did.

I am now going to read you your notice. The first part of it has to do with the grandfather clause case, and then down below, quoting: "Notice is hereby given that although application herein is for a certificate or permit on form BMC—1 the Applicant must establish also the corporate relationship existing between the Applicant herein mentioned and the Ziffrin Truck Lines and if said Applicant, and the Ziffrin Truck Lines are found to be affiliated, within the meaning of Section 5, Subdivision 6 of Part I". I am quoting now, I will go back now again. "Applicant must also establish that a permit may be held by Applicant con-
[fol. 797] sistent with the public interest under the policy declared in Section 202-A of the Motor Carrier Act, and within the meaning and contemplation of Section 210 of the Motor Carrier Act. As soon as we got into the second part of this hearing, I objected to any further proceedings and if there is anything I am firmly convinced about, I am firmly convinced I am right about that.

You gentlemen know, and the Examiner admits in his report that only those parts of Part I which deals with rail carriers that specifically made applicable to motor carriers

apply to motor carriers under Part II. The provision that is cited in this notice—and the thing that we were told that we had to come in and prove, is under Part I, not applicable to motor carriers and I say without fear of successful contradiction that due to the fact that the notice was defective, calling upon us to do something that was void, under the decision of the Supreme Court of the United States recently handed down by Mr. Justice Hughes involving the National Labor Relations Board, where they didn't get proper notice, I say, gentlemen, that if there is any order made in relation to the second part of this hearing on this defective notice it is void.

Commr. Lee: Is the notice insufficient?

Mr. Ellis: The notice required us, Judge Lee——

Commr. Lee: I know, is it insufficient or is it just wrong?

Mr. Ellis: It is wrong.

[fol. 798] Commr. Lee: Well, does that bring it within the National Labor Relations Board decision?

Mr. Ellis: I think clearly so, your Honor, I wish I had time. I have got the decision here. I haven't got time to discuss it but at least that's my view. But, in any event, I am calling that to your attention because I think it is interesting, and while this is an order of Division 5, I don't know where this originated. I think it is interesting to know that what we were ordered to do was to come in under an Act that didn't apply to us.

Now, the Examiner said in his report that it could have been brought under some other sections, of the Motor Carrier Act, it's true. That's right. But what you did do, and not what you might have done is controlling.

Now, after this notice was given the Motor Carrier Act was amended and the provisions of this part of Part I, to which I have made reference, were substantially written into the Motor Carrier Act. My second proposition is that regardless of what the notice may be or anything else the Section, if you take it out of Part I, or if you take it out of the Motor Carrier Act which didn't exist at the time this notice was given, it isn't applicable at all because it applies to future consolidations and mergers and not to a condition or set of facts which existed prior to the enactment of the Motor Carrier Act.

Commr. Rogers: Well, do you deny that Mr. Ziffrin has [fol. 799] both the common and contract operation?

Mr. Ellis: Sir?

Commr. Rogers: Do you agree that Mr. Ziffrin had a common and a contract carrier operation?

Mr. Ellis: I agree, and I am hoping I am going to be able to get through, as I say it is very difficult. I think this is a rather complicated case, to get it all before you in a short time. Ziffrin, Incorporated, is a contract carrier. Ziffrin Truck Lines, the other company mentioned in this case, is a common carrier. There isn't any question about that, but as I will show presently, if I can, there are two separate identities, separate stockholders, different people, organized for different purposes and fulfilling different missions lawfully under the Motor Carrier Act.

I don't believe I had better take time to read this——

Commr. Alldredge: Let me ask you this?

Mr. Ellis: Yes, sir.

Commr. Alldredge: How about the similarity of the names of these two companies in relation to their possible effect upon the public that patronizes them? That's really what the law——

Mr. Ellis: I think you hit the nail on the head, Mr. Commissioner, the only thing that is involved here is because they happened to use Mr. Ziffrin's name on both of them and I will tell you why that was done, in my opinion.

Commr. Rogers: Mr. Ziffrin is the main wheel in both of them, isn't he?

[fol. 800] Mr. Ellis: Mr. Ziffrin is a minority stockholder in the company that I am now advocating the cause before this Commission. Mr. Ziffrin is the majority stockholder in the Ziffrin Truck Lines, the common carrier.

Commr. Rogers: In the practical administration of the conduct of the business, isn't Mr. Ziffrin the main wheel in both of them?

Mr. Ellis: Mr. Ziffrin does a lot of the actual truck work for both of these companies and for some other companies too, and for fear I may not get to it later on I want to give you a picture right now. I think it becomes important and imperative that this Commission know who these people are.

Ziffrin Truck Lines, that's the common carrier, which is cited in here, by indirection in this case, is owned by Mr. Sam Ziffrin who is sitting back there, his wife and his two sons. It's a family affair. They own it.

Commr. Alldredge: Now, that's the common carrier?

Mr. Ellis: Yes, sir. Ziffrin, Incorporated, the company that I am appearing for here now, Mr. Ziffrin—Mrs. Levy,—I have got her name here, I know the lady well, who is related to Mr. Ziffrin being his sister-in-law, Mr. Frank McHale of Indianapolis, Mr. Berger of Long Island in New York City and Mr. Burman of Logansport, Indiana, whose decease occurred since the time of the hearing. Now, who are they? I think I ought to tell you. Mr. Ziffrin who is in both of these companies has been in the trucking business a great many years; he has got a lot of other business in-
[fol. 801] terests; at the time of this hearing he was vice president of the American Trucking Association, so I guess he has some standing at least in the industry. The lady who is a member of this board, and a stockholder in the company, in a modest way, is a fine lady and a business lady and I think no more need be said about that. Mr. Frank McHale——

Commr. Lee: Why should we know what these other people do; what difference does it make to us?

Mr. Ellis: Because——

Commr. Lee: Whether they are important politically or not, why make it a part of this record?

Mr. Ellis: I will tell you why, your Honor, in my opinion. The Examiner's report indicates that these reputable and reliable citizens who were the majority stockholders in the corporation that I am now appearing here for have virtually entered into a conspiracy to allow Mr. Ziffrin to violate the Motor Carrier Act and manipulate the company in which they have substantial financial interests against the public interest, and so I think it is important to know that these people are not that kind of people, at least we don't think they are.

Commr. Lee: Well, does the record show who these people are?

Mr. Ellis: Yes, sir, except the one change which has been caused by a death since the time of the hearing.

Commr. Lee: Shows their outside interests and all that sort of thing?

[fol. 802] Mr. Ellis: Yes, sir. Told who they were. They were very very anxious in finding out who the stockholders were in this corporation, in fact, both of them, Judge Lee.

Commr. Alldredge: Do these two companies operate in the same area?

Mr. Ellis: The Examiner's report finds they do. They do to this extent; Ziffrin Truck Lines, the common carrier, has certain specific routes, operates over them under authority heretofore granted by this Commission as a common carrier. Ziffrin, Incorporated, the Applicant in the case at bar, operates as a contract carrier over territory generally the scope of which is much wider and entirely different as we view it, from the scope of the operations of Ziffrin Truck Lines.

Commr. Alldredge: Well, now, does the public know the difference between the two?

Mr. Ellis: I think they do, your Honor, at least the traffic managers testified that they did, the people who used the service.

Commr. Alldredge: If a shipper wanted common carrier responsibility for his shipment, would he be able to tell the difference between these two operations?

Mr. Ellis: Certainly, Ziffrin Truck Lines, the common carrier, has advertisements, telephones, solicitors, tariffs, holds itself out, does all the things that a common carrier does. Your Commission has already held that they were a [fol. 803] common carrier and has adjudicated its grandfather clause rights. Ziffrin, Incorporated, operates solely for the company that it has under contract and most of it is the transportation of alcoholic beverages under contract which was begun immediately after the repeal of the Eighteenth Amendment and it has been carried on since that time.

Commr. Alldredge: But you have asked for authority, have you not, on the part of the contract carrier to haul general commodities, just like a common carrier?

Mr. Ellis: That's true as to our application, your Honor, but as I said a moment ago, we attempted and in behalf of this applicant to present our position on that matter in the Keystone case. Whatever the decision in the Keystone case and however it is applicable, at least, it is part of this Commission's concern, and must, of course, apply to this contract carrier, as well as any others, and if I understand that decision aright from my hurried reading it is to the effect that the same practice which has been going on in the past will be followed in the future, to-wit, contract carriers will be limited to certain commodities.

Commr. Rogers: Along the line of Brother Alldredge's question, does the record show whether or not any of the

common carrier line's customers switched over to the contract carrier operations after the minimum rate order in Ex Parte 21?

Mr. Ellis: It does not. I do not believe that to be a fact [fol. 804] and I do not believe that in this instance the question of rates has anything to do with this whatsoever.

Commr. Rogers: No. I was just thinking if that be true it would have connection with Brother Alldredge's question, as to whether——

Mr. Ellis: Yes, sir. Well, I wasn't disagreeing with you, Mr. Commissioner, but I mean I think under the facts here, our minimum rate schedules and our contracts are on file here and the question of rates is not the question. I will tell you what the real question is, it is trying to get this whisky business away from us. That's what the real issue is. Ziffrin, Incorporated, established——

Commr. Rogers: Well, what I had in mind, Mr. Ellis, I have heard from several sources—and if it isn't in the record why then I want to put it out of my mind—that what Mr. Ziffrin did after the rate order was put out in Ex Parte 21 was to go out and make contracts with his principal customers so that he wouldn't be bothered by the minimum rate order as to those customers. Now, I am just trying to find out——

Mr. Ellis: Well, there certainly is no set of facts of that kind in this record.

Commr. Alldredge: Now, what inhibition would there be, for instance, to such action like this. If this common carrier could not get the business at its regular common carrier rates it could just send the contract over and underbid them?

[fol. 805] Mr. Ellis: Well, I think the best explanation that I can give you about that would be what I think the record shows and what the fact is. The contract carrier hauls truckloads of whisky under contract. The common carrier, while in a few instances might have hauled a few truckloads, the testimony of these shippers, the traffic managers, the men who routed and who are responsible for it, and it is in here time and time again, from every one of the representative- of these distilleries, that when they used Ziffrin Truck Lines, the common carrier, it is for less than truckload shipments. Ziffrin, Incorporated, handles truckload shipments or liquor and that's its principal business although we insist on the rest of this. I see that I have got

to save a little time for rebuttal and want to only call attention to one other matter.

In this report, the Examiner finds that these two corporations are under dual control although they are separate corporations, pay separate income taxes, have separate things, they are all set out in my brief and I wish I — recount to you the proof that we put in showing the differentiation between these two corporations, but I can't do it in the interest of time. But here is what he found finally. He found that in spite of all that they were manipulated—I think that is almost a fair interpretation—he does not use that word—some way and against the public interest or would be. He said he couldn't find out any time anybody had ever been hurt or that anything had happened in the [fol. 806] past, but he feared something might happen in the future and so here's what he said:

"And in order for this Applicant, Ziffrin, Incorporated, to get its grandfather clause rights, we would have to force Ziffrin Truck Lines," a company with different stockholde-, different ownership and not a party to this case, and whose grandfather clause rights have already been adjudicated in other proceedings that we would have to force them, if you please, to come in here to your Commission and surrender their grandfather clause rights that they have already obtained by your order before we can get what we say the Motor Carrier Act entitled us to in this proceeding.

Commr. Rogers: Have you proceeded solely on the basis that they are entirely separate, that there is no dual operation, or have you attempted to justify a dual operation?

Mr. Ellis: Your Honor, we did that also, and in my brief, and I had intended to conclude my argument with it, that resolving every doubt against it, conceding that every proposition that the opponents, the opposition and the Examiner have advanced is true, we proved by conclusive evidence that this is consistent with the public interest if you want to apply it because I think the best proof of public interest is consistent performance for shippers transporting commodities in the interest of the public of United States.

Commr. Alldredge: Well, now, confusion isn't in the [fol. 807] public interest, is it?

Mr. Ellis: Confusion is not in the public interest and the only confusion, your Honors, that I think in this case exists in the minds of our opponents and of the Examiner. I don't

think there is any confusion exists in the minds of the shipping public. I feel that I will have to desist now to have a moment later, but I say again I earnestly request that you will consider what we have set out about the evidence showing that these are separate corporations and the separate matters involved.

Commr. Lee: Mr. Shields.

Argument of Mr. Shields

Mr. Shields: If the Commission please. I didn't expect to be limited to the short time that I have and for that reason on learning that I reduced my remarks to as close to the point as possible and in writing.

Commr. Alldredge: Did you participate in the hearing?

Mr. Shields: Not at the hearing, your Honor, and I will attempt to explain that to you in my argument here.

Commr. Alldredge: You asked the Commission to give you a hearing?

Mr. Shields: That occurred by reason of the fact that the companies that I am appearing here for are members of an Association represented by an attorney who filed his petition, and included the Keeshin Company as a member of the Association and ask that I sign a petition with him [fol. 808] which I did as attorney for the Keeshin Company only.

I am appearing at this argument in behalf of the three common carriers by motor vehicle all of whom operate over the same routes and between the same points and in the same territory as the Applicant contract carrier and its closely affiliated common carrier. Appearances were not made by the three carriers whom I represented at the hearing held before an Examiner on the Application under consideration here, however, we were fully aware of a previous proceeding before the same Examiner, having to do with the closely affiliated common carrier application and I am speaking of Ziffrin Truck Lines, Inc. MC 2510, the common carrier. One of the most controversial issues concerning the entire Ziffrin operation both contract and common is the close relationship both corporately and personally which, if closely examined, and analyzed, will be found to be actually common ownership, common control and management and actually involves service over the same routes between the same points and in the same ter-

ritory transporting the same commodities for the same shippers. In the Examiner's report on the common carrier application which became the order of the Commission, this close relationship was fully recognized and dealt with and for that reason we felt assured that the Examiner's findings in the contract carrier matter would be substantially the same and as a matter of fact they were.

However, the proposed manner of disposing of the situa-
[fol. 809] tion was most unexpected and is the reason for my intervening in behalf of the three common carriers whom I represent. I have read the entire transcript of the record in this case and checked over some of the documentary proof and while I do not agree that the bona fide operations of the contract carrier on or prior to July 1, 1935, were actually as found by the Examiner, I will not dwell upon it at this time, but rather confine my remarks to the recommendations that the Examiner is proposing to be the action of the Commission.

It is recognized that the situation cannot be reconciled with Section 210 of the Act. A mere glance behind the corporate veil of Ziffrin, Incorporated, the Applicant here, and Ziffrin Truck Lines, Inc., its affiliated common carrier, is conclusive that the same person, in this case two closely identified corporations, both exemplifying Sam Ziffrin and family holds a certificate as a common carrier and if this report is adopted a permit as a contract carrier transporting the same property over the same routes and which is in the same territory, without good cause having been shown, that the holding of both types of authority is consistent with the public interest and with the policy declared in Section 202 of the Act.

It is proposed that because grandfather rights exist some method should be found to preserve them separately and distinctly. As to that I wish to point out that as I view
[fol. 810] the record it is highly probable that the grandfather rights set up as belonging to the Applicant here, are in fact part and parcel of the common carrier business and not a specialized service which the Applicant continually strives to substantiate. Other than the requirements of the Motor Carrier Act the only differentiation in the two businesses came about in the first instance through an order of a state commission requiring separate and distinct records to be maintained by the two corporations. Not in a single instance were contracts entered into except in

the usual vague verbal manner until required by this Commission.

Dealing for a moment with the alleged specialized service of the Applicant here the only argument advanced is the special protection and convoying of truckload liquor shipments by the contract carrier with only ordinary protection given less than truckload liquor shipments by the common carrier.

Now, in analyzing what would be consistent with the public interest we must deal with existing facts and existing situations. During the prohibition era and for a short time after repeal it is admitted that there was a great deal of hijacking of liquor. Shipments moving by motor vehicle over the highway. But that day is past and today there is little or no hijacking of liquor, not because of the protection that may be afforded but because of the close supervision of the government over liquor in bond and under seal, and for that reason the market for stolen liquor is very limited today.

[fol. 811] Therefore, the argument of special service based on protection in convoying is of little or no weight. An example was advanced where occasions arose requiring a peak movement of liquor within a short period, I think it was 24 hours, requiring a concentration of equipment to effect the movement. If that point has any weight it should apply only between the points involved which happen to be closely located warehouses and not over the broad territory sought by the Applicant here.

Furthermore, it is not an uncommon thing for common carriers to be called upon to render just such a service and I do not believe it can be looked upon as something of a specialized nature.

I am merely throwing out these objections so far for consideration by the Commission and while they are important and reveal the true situation with which we are dealing I want to pass on to a more serious aspect of the Examiner's Proposal; that is, to chisel out, or rather to carve out, of the already existing common carrier certificate held by the closely affiliated common carrier corporation, those rights which are proposed to be given to the contract carrier corporation in this proceeding, this method of disposing of the matter came as a distinct surprise, and as I stated, the reason for our intervening. Even though the common carrier corporation fully accedes to such a

proposal it will not amount to substantial justice and would not be consistent with the public interest for reasons which [fol. 812] I will point out and after careful consideration it has been given, I am sure, the Commission will agree.

It happens that the operations of the two closely affiliated corporations are between points in a territory that is highly competitive from a transportation point of view, and where there is an abundance of service, particularly in the transportation of commodities which the Applicant here is bending every effort to be in a position to control the cream of the traffic because of preferential rates. This, not only would be possible but is actually taking place today because of the specially favored position occupied by this and other contract carriers.

In the first place there are very few really true contract carriers, which in my estimation are in reality only a step removed from a private carrier, the Commission has my views concerning that question in the Keystone and related cases, and I do not want to go off on a tangent by discussing it here. However, I will say that unless something is done about placing the contract carrier in his proper category, either through legislation action by Congress or by this Commission under our present law, we might as well forget about even an approach to the solution for the rate situation throughout the country.

Without going into detail it must be admitted that the findings of the Examiner in the common carrier case and the findings of the same Examiner in this case provides opportunities for unfortunate, unhealthy and disastrous [fol. 813] complications. If the situation is permitted authorizing dual operations on the basis of existing grandfather rights then certainly an existing common carrier would have an equal right to purchase an existing contract carrier even as to limited commodities and this Commission said in the Dunbar Case that that cannot be.

The operations under consideration here are not only parallel in the same territory but they are between the same points, for the same shippers handling the same commodities and in the one case in truck load lots and in the other case less than truck load lots. By allocating the truck load business to the contract carrier and the less than truck load business to the common carrier even on certain commodities would and does provide a perfect set up for undisclosed preferential rates by the contract carrier. This

would be true even though the operations were not between the same points, but were limited to and from the same points because not only the same class of shippers are involved but the records of the two carriers will reveal that actually the same identical shippers are involved.

In closing I want to say that I am sure the Commission realizes the tremendous importance of this decision. And after balancing the facts contained in the record pertaining to these two closely affiliated, closely owned, managed and controlled and jointly operated companies, I am sure it will refuse to adopt the proposal of the Examiner and follow the precedent it has already so well established [fol. 814] and not permit this dual operation to exist.

Commr. Rogers: Does the record show how many contracts Ziffrin had on June 1, 1935, or July 1?

Mr. Shields: As I have attempted to point out here in the short while I had, as I read the record it appeared to me that the only contracts they had on June 1, or July 1, 1935, were in a vague verbal nature.

Commr. Rogers: Does it show how many they have got now?

Mr. Shields: I believe the record discloses certain contracts that were afterward entered into in writing by complying with the requirements of this Commission, but I don't believe it discloses exactly how many. There are certain ones talked about.

Thank you, very much.

Commr. Lee: Mr. LaTourette.

Argument of Mr. LaTourette

Mr. LaTourette: If your Honors please, I appear in this case in behalf of the American Trucking Associations, Inc. common carrier division, which division is solely interested in that phase of this case relating to dual operations. The division is not concerned one way or the other with the scope of extent of the grandfather rights that might be involved in this case.

I also appear in behalf of certain motor carriers on brief and by exceptions, and at the hearing, those carriers being [fol. 815] set out in the brief. There have been two casualties in the list, however, since the briefs were filed. I was required to withdraw the names of Great Central Transport Corporation and Husman & Roper under a de-

mand made by Mr. Luther, Traffic Manager of the Seagrams Company, who testified at this hearing, who threatened that unless that withdrawal was made those two clients would suffer loss of tonnage which had theretofore been routed over their lines, and of course, to retain their position with the company they were required to instruct me to withdraw their names from the brief and exceptions which the record will disclose.

Commr. Lee: The man was a witness, you say, in this case?

Mr. LaTourette: A witness in this case.

I think at the outset I should clear up some questions raised by Mr. Ellis and which, I believe, are in the minds of your Honors, with respect to these two affidavits which were filed after the hearing, one by District Supervisor Snodgrass and the other by Mr. Sam Ziffrin, the president of the Applicant. There was no stipulation or agreement at the hearing that such affidavits could be filed and in response to your inquiry, Judge Lee, I desire to say that in behalf of my clients on brief I objected to the receipt by the Commission and consideration as evidence of the affidavits which were offered. I cite authorities by this Commission in support of my position in that case. Now, with respect to the documentary——

Commr. Alldredge: May I ask you this? If the affi- [fol. 816] davit of our District Director had simply been in the form of a transcript or notes of the evidence which had been tendered to him would it have been objectionable?

Mr. LaTourette: Well, the affidavit was not in that shape, your Honor, it simply was a statement that there was proof offered to sustain the compliance order at the time the parties appeared before the Supervisor. Now, I don't know why Applicant didn't bring the supervisor into the hearing for the purpose of having him testify on the record. He is located in Indianapolis, and he was readily accessible to the Applicants but they chose to file an affidavit after the hearing had closed and, of course, it placed these Protestants in a rather delicate position having to discuss an affidavit of an employe of the commission and we simply reserved our right under the well-known rule to object on the ground that opportunity to cross-examine was not afforded.

Now, as to the digest of documentary proof. There was a full agreement by all of the parties that a digest could

be prepared after the hearing, and the Examiner did request that a digest of documentary proof be prepared. Myself and Mr. Goodman of Chicago were selected as a committee of two to examine this digest of documentary proof and the documents supporting it, and thereafter submit in writing our statement of comments to all of the parties as well as to the Commision and we met in Chicago for that purpose, there being present Mr. Ellis, Counsel for the Applicant and his associated counsel Mr. [fol. 817] Loughry and myself and Mr. Goodman and we jointly signed the memorandum certifying to the contents of the digest with appropriate comments on the documents which were offered in support of the digest. And it will be interesting to your Honors to observe that statement of comments which I have filed as an appendix to my brief. It indicates to a great extent the confusion that exists today with respect to these two operations. How a bill of lading is offered Ziffrin Truck Lines and accompanying that bill of lading a delivery receipt of Ziffrin, Incorporated. In fact, the record will show and I will discuss at a later point in my argument that the shipper witnesses were so confused that in cross examination they said they didn't know how their traffic was moved, whether it was moved by Ziffrin Truck Lines or Ziffrin, Incorporated, and I will discuss that at a later point in my argument.

Now, I have not been able to locate in the record any place where the Examiner has said that he would not receive the shipper testimony unless documentary proof was offered. I made a hasty examination of it. Counsel may be correct in his statement. I have only been able to locate this particular point in the record. The Examiner said, at page 298: "Now, gentlemen, how about the matter of presenting the documentary evidence", and I think he had before that point at some stage in the hearing made the suggestion to the Applicant that while the Applicant was trying his own case he thought it would [fol. 818] be well for him to supply documentary proof, and following that this statement comes on. We then entered into this arrangement whereby the documentary proof would be submitted after the hearing and subject to the inspection which I have just mentioned.

Commr. Alldredge: Well, now, the Examiner, you say, did not positively refuse to receive the oral testimony?

Mr. LaTourette: The record is full of the oral testimony, your Honor, and it is set forth completely in the record, and I want to discuss the nature of that testimony in detail in support of the Examiner's conclusion that it cannot be received as having any weight in establishing the particular scope of the operation but rather it establishes the general nature of the business, and when we get through discussing that testimony, your Honors will see how it was so indefinite in character that there was no basis upon which the Examiner could make a specific finding as to the scope of the operation.

Now, there was another mentioned made that the Examiner made an inference in his report that a conspiracy was existing whereby this applicant sought, under cover of a contract operation, and by concealing stockholders, to gain some advantage. I have read the Examiner's Report and I find no mention made of any statement of that character. He does discuss Section 210 and what that section means and implies, and he goes on to say that the discrimination which the section is designed to prevent cannot exist so long as applicant in the common [fol. 819] carrier company do- no- transport the same commodities between the same points. Now, he makes no charge that there is any attempt to deceive this Commission or the parties with respect to the dual operation, but he does find that the dual operation exists and I think his conclusions are entirely sound in that respect.

Now, I should like to discuss the proof as it relates to the grandfather rights in this case. As I said, there was oral testimony by these shipper witnesses, and I would like your Honors to read that testimony very carefully. I say in all kindness it was my view that those witnesses were entirely hostile. There were situations on cross examination where they refused to answer questions. When the question of documentary proof was discussed, they said they stood on their rights under the Motor Carrier Act in not having to reveal to anybody their records, that they did not have to reveal them. It is apparent to me that they were interested in this matter and in preserving this contract carrier relationship solely from the standpoint of advantage in rates, and there is contained in this record, and mentioned in the brief which I filed for my clients reference to the differences in rates which exist as between the common carriers and the contract carrier in this case.

Commr. Alldredge: If the dual operation were authorized in such circumstances that confusion could result, would a requirement that the particular contract carrier observe as minimum the rates of the associate common carrier help the situation any?

[fol. 820] Mr. LaTourette: I think it would, your Honor, I think it would relieve it a great deal but I am going to discuss with you a little later on my feeling that in view of this direct affiliation which exists between these two companies that what the so-called contract carrier is doing is a part of the common carrier business of Ziffrin Truck Lines, and they are so related and so affiliated that the major portion of the business is common carrier in nature and under your decision in the Kane case I believe that the operations heretofore conducted by this Ziffrin, Incorporated, should be construed along with the general operations conducted by the two companies, and this Applicant's operation found to be that of a common carrier.

Now, the Examiner, in discussing this shipper testimony at Sheet 9 of this report said this: "While the testimony considered is entitled to weight in establishing the general nature of Applicant's business, on and prior to the statutory date, in view of the opposition to the application such testimony cannot be considered as indicating definitely the scope of the authority to which Applicant is entitled."

Now, as I have said I agree with that conclusion. Counsel talks about the sole question being whether or not the testimony is true or false and seems to indicate that the Examiner's view was unsound but I think it conforms to the finding by this Commission in Bornstein Contract Carrier [fol. 821] Application Case, reported in 2 M. C. C. 95.

Commr. Rogers: Did these shipper witnesses say where Ziffrin had moved shipments from and to and that sort of thing?

Mr. LaTourette: I intend to discuss that, your Honor, in just a few minutes.

Commr. Rogers: All right.

Mr. LaTourette: However, I think the Examiner, as I said, is correct in his conclusion relative to just what this shipper testimony means and shows in this case. Now, applicant in its exceptions——

Commr. Lee: Well, surely its admissibility or its value or its weight would not depend upon whether or not there was opposition in the case?

Mr. LaTourette: No.

Commr. Lee: That technical thing just couldn't be.

Mr. LaTourette: That possibly is not a correct way to state it, your Honor, however, you did say in the Bornstein case—I don't know whether you wish me to repeat that at this time, I will simply refer to the case and the citation is L. C. 96 and 97 in that case, and I ask you to consider that when you read the statement of the Examiner dealing with this shipper testimony.

Now, the Applicant, in its exceptions, discusses this shipper testimony and questions the conclusion that the Examiner reached relative to its weight. The first witness whose [fol. 822] testimony he discusses is Witness Chandler with the Frankfort Distilleries, Incorporated, and the Applicant states that Witness Chandler pointed out specifically that many of the distilleries for which he appeared at the hearing are located outside of Louisville, Kentucky, and within that portion of the state of Kentucky within a radius of approximately 150 miles. That statement was made to show a radial operation from Louisville which the Applicant had claimed, but the Applicant, in its exceptions, does not say to you that this record shows at page 43 of the transcript that when Witness Chandler attempted to testify respecting all of these other companies who belonged to the Kentucky Liquor Producers' Traffic Association of which he was Executive Secretary, that there was an objection made to his qualifications on the ground that he could not be familiar with their operations and that objection was sustained. So as far as Witness Chandler's testimony going to prove any radial operation from Louisville to the point of 150 miles, there is nothing in the record to sustain that.

Now, applicant goes on to say that the record fails to disclose that Mr. Chandler testified inasfar as his own companies were concerned, he had personally routed the shipments and had personal recollection thereof.

Now, this was the witness, your Honors, who I think was extremely hostile and the record will disclose that. He was asked whether prior to the year 1936 shipments moved via [fol. 823] the Ziffrin Truck Lines or the Ziffrin, Incorporated, the contract carrier. He said he didn't know. He

said: "You will have to ask Mr. Ziffrin about that." And that statement appears at page 54 of the record in this case.

Now, on page 8 of the exceptions the Applicant discusses the testimony of Mr. Luther, the General Traffic — of Seagrams, who is the gentleman who instructed my clients to withdraw from this case. The record developed that Mr. Luther had been stationed at Relay, Maryland, up to 1938 and thereafter went to Louisville, Kentucky, and he attempted to testify as to what went on in Louisville in 1935. Now, this witness said, directing his statement to the Examiner, at page 91 of the record: "I might state, if the Examiner would permit, there is no one in the company at the present time that I know of that could be put on the stand to testify as to exactly what took place prior to that time, 1938". Now, certainly there is no testimony there going to establish any scope of operation. The testimony is no stronger than Mr. Chandler's testimony which meant nothing.

Now, Mr. Gusky also testified. He could give no reference whatever to any particular shipments with respect to particular origins or destinations, and you will find at page 109 of the record that he admitted he could not give such references.

Now, counsel has elaborated upon the testimony of Mr. Rumrill. He said that he came into the hearing with pro [fol. 824] numbers and showed movements prior to July 1st, and continuously since that time, I want to call your Honors' attention to what this witness did show. He had been in the hearing room and heard this cross-examination directed to the various witnesses attempting to elicit from them specific information as to specific shipments and specific origins and destinations, and he was wised-up by the time it was his turn to go on the stand and he went to his office and endeavored to get some records to assist the Commission in this case. After having examined his records he came into the hearing room and he gave us reference to four shipments, two of which moved from Indianapolis to Cincinnati on January 2nd, and January 8th, 1934, respectively, two of which moved from Indianapolis to Peoria, Illinois, on February 28th, 1934 and March 6th, 1934. He gave no other documentary evidence or other proof as to specific shipments.

Commr. Rogers: Well, did those shipments show specifically by which line they moved?

Mr. LaTourette: The witness, as I recall the record, stated that the freight bills were on the stationery of Ziffrin, Incorporated, your Honor. Now, this witness said, however, at page 159 of the record that he didn't know whether Ziffrin Truck Lines or Ziffrin, Incorporated, transported the shipments.

Now, counsel, in exceptions on page 19, discusses the testimony of Mr. Perry, Traffic Manager of the Kraft Phenix Cheese Corporation, but he doesn't set out in his exceptions [fol. 825] the complete statement of the Examiner dealing with this testimony. He said the Examiner waved aside this testimony with a statement. "However, the witness was unable to refer to any specific shipments by dates, weight or other methods of identification", but the Examiner's statement did not stop there. The Examiner went on at page 7 and 8, the bottom of the page, as follows: "And it developed that he had no personal knowledge of the contract between his concern and Applicant on the statutory date, his knowledge having been gleaned from conversation with superior officials." In other words, the testimony was purely hearsay in character, something that some one else had told him, and under the ordinary rule of evidence would not be admissible in any event.

Now, that is the nature of the shipper testimony which was offered to prove an operation of the scope here requested by this Applicant. Obviously the Examiner was sound in his conclusion when he said that the only weight that the testimony could have was to show the general nature of the operation of this Applicant. Now, the digest of documentary proof shows this: It shows that as to liquor there were movements from Lawrenceburg to Chicago, Cincinnati, Fort Wayne, Indianapolis, Gary, South Bend, and Terre Haute, and that there were movements from Terre Haute to Lawrenceburg. Now, our exception to the Examiner's finding in connection with the authority from Lawrenceburg is this: that it extends to the entire state of Illi- [fol. 826] nois, and from Louisville extends to the entire state of Indiana and Illinois. Now, there is no documentary proof whatever as to operating rights from Louisville to any of the territory and the Examiner concludes that he was under the impression that none of the Protestants were questioning the right to operate from Louisville. Well, we

are, and the record does not support any finding of authority to serve Louisville as a point of origin.

Now, I think, in determining this irregular route authority your Honors will have to follow the Davidson Transport Case decided October 3, 1939, being MC. 69281 which cites with approval the Powell Brothers Case reported in 9 M. C. 785. I wish to pass on now and leave to my brief and exceptions the other discussion as to the territory which the Examiner authorized here and that will set forth fully our contentions there. I wish for the next five minutes which I think I have to deal somewhat with this question of affiliation.

If there ever was a record in any cases which shows affiliation, this record does. And that question is fully discussed in the brief which I filed in behalf of my clients. This carrier has its name painted on the trucks and Ziffrin Truck Lines, the common carrier, has its name painted on the same trucks. A driver starts from Louisville and goes to Chicago in a truck of Ziffrin Truck Lines and that same driver may haul in return movement from Chicago to Louisville freight for the contract carrier. In other words the [fol. 827] employees are interchangeable. In fact, the record shows and Protestant's Exhibit No. 7 shows that even the Indiana Commission, after examining the records of these two companies in 1936, found that the confusion was so great that they could not tell who was doing who. They did not know where Ziffrin, Incorporated, was transporting property or where Ziffrin Truck Lines was transporting property. And they were so impressed with it that they issued an order on both of the Applicants to separate their business and your Honors will find that discussed on page 7 of my brief.

Now, as to the stock of Ziffrin, Incorporated, the record shows that there were 490 shares outstanding of a thousand shares issued—no, I am wrong about that, your Honors. There were 1,000 shares authorized. Sam Ziffrin held 490 and Mr. Levy, his sister-in-law held 15 shares and Mr. Burman held 390. Mr. Ziffrin, together with his sister-in-law controlled 51½ per cent of the stock and Mr. Burman who is alleged to be the holder of the other stock, the record shows, has not attended a board of directors' meeting of this company for over two years. Certainly he has nothing to do with the operation of the business or he would be in attendance at these directors' meetings.

The rest of the question dealing with affiliation is set out fully in the brief and I think that I need not go into that thoroughly, your Honors can resort to the brief to determine that.

Now, in conclusion, I think that these two companies are [fol. 828] so closely affiliated that they are one and the same for all purposes and that we must consider it from the standpoint that the major part of the affiliated company's business is that of a common carrier.

You found in Kane Common Carrier Application, 3 MCC 741, that the general nature of a motor carrier's business, rather than the existence of one or more contracts with shippers determine- its status under the Act. And I think this case is parallel to the Kane Case. I think the only way that this situation can be corrected so that the public is protected, that the common carriers are protected, and I wish I had opportunity to discuss the Keystone Case with your Honors, but I won't have. The only — that those protections can be thrown around the common carriers and the shipping public is for these two operations to be unified and considered as one common carrier operation, with the authority to be consolidated.

I believe my time is up and I thank your Honors for listening.

Argument of Mr. Ellis (In rebuttal)

Mr. Ellis: I understand I have only three minutes left and of course the many things we have been discussing I can't do very much except call attention to one or two things.

There was a question asked by Commissioner Rogers and Mr. Shields answered it. I am sure he thought he was answering it correctly, because he was not familiar with [fol. 829] the record, and that was whether we had any written contracts, and he said they were all verbal.

Commr. Rogers: I didn't ask him if you had any written contracts. I asked him how many you had.

Mr. Ellis: Well, perhaps that was your question, Mr. Commissioner, but in any event, he went on and said we had no written contracts until they were required to be filed with this Commission. We proved by the head of the Tariff Department of the Indiana Public Service Commission, at page 175, of the record, that we had a written contract on

file with that Commission under our Contract Carrier Permit there prior to, on and since 1935. In my brief, I have referred to the testimony in this record, and I only want to mention just one. It is said here that we didn't prove by these witnesses the territory. Witness Gusky introduced an exhibit listing some 25 or 30 important cities and towns in this territory scattered out in these states that he said his company, which was the Schenley, one of the biggest whisky companies in the United States, had shipped to by Ziffrin, Incorporated, on and before July 1, 1935, and he testified that he made up the Exhibit in New York City in his office from the records of the company, if you please, a day or two before the hearing and came out to Indianapolis to attend it.

Mr. LaTourette: Isn't it true that the record shows that that exhibit was prepared in Mr. Ziffrin's office and handed [fol. 830] to Mr. Gusky at the hearing?

Mr. Ellis: No, sir, that is not the facts as I understand it. Mr. Gusky prepared this from his information in New York City. However, that may be, I now want to close by referring to the matter of letting this evidence in. Witness Chandler who intervened in this case and filed an intervening petition in behalf of all these little distilleries down there in Kentucky, of which there is a legion of them in the territory out and around Louisville, is vice president of their association, was not permitted to testify in this record as to the service that we had given to those companies under contract on, before and since July 1, 1935.

Commr. Rogers: Did he qualify?

Mr. Ellis: Yes, sir, I think he was thoroughly qualified.

Commr. Lee: Did he say he knew what service they had given?

Mr. Ellis: Yes, sir, he said he knew and he was not permitted to give that testimony.

Commr. Alldredge: On what grounds?

Mr. Ellis: Well the objection, I believe, was made by my friend Mr. LaTourette, I think he objected on the ground that he was not an officer of those companies themselves. I believe that's right, Mr. LaTourette. But anyway Mr. LaTourette made some objection and the Examiner held he wasn't qualified. That was the import of it, if it please the Commission. I know I have trespassed too long on your time and I want to close this case as far as I am con- [fol. 831] cerned with just this remark.

Commr. Rogers: Well, is it your contention that the Examiner just arbitrarily would not let that man testify?

Mr. Ellis: Well, whether it be considered arbitrary or not, Mr. Commissioner, he wasn't allowed to testify.

Commr. Rogers: The Examiner who heard this case has had a lot of experience. I just want to know what you contend about it.

Mr. Ellis: I contend that he should have been allowed to testify as to the companies that he was vice president of their association, he was prepared to testify as to what they were doing and he wasn't permitted. I think he should have been permitted to do so.

Commr. Rogers: Ordinarily the vice president of an association, unless he was going at it especially or as something out of the ordinary, wouldn't know the details of an individual member of that association's business. Now, what I am interested in here is whether this vice president had shown himself familiar with the detail business of the members of his association.

Mr. Ellis: Well, we think we qualified him, Mr. Commissioner. The Examiner thought otherwise. I am not criticizing the Examiner except I disagree with him. Thank you very much.

Commr. Rogers: All right.

Commr. Lee: This case is taken under advisement.

(Case submitted.)

[fol. 832] PLAINTIFF'S EXHIBIT No. 4

Ziffrin, Incorporated

Balance Sheet as of November 29, 1941

Assets

Current Assets:			
Security Trust Co.		$11,469.24	
Merchants National Bank		4,957.83	
Working Funds—Chicago		107.46	
Public Service Deposits		1,710.00	
Accounts Receivable—Trade		18,221.92	
Accounts Receivable—Other		5,660.74	
Inventories—Tires and Tubes		7,002.03	
Total Current Assets			49,129.22
Tangible Property:			
Revenue Equipment	44,890.56		
Reserve for Depreciation	24,628.39		
		20,262.17	
Office Equipment	1,657.11		
Reserve for Depreciation	313.43		
		1,343.68	
Total Tangible Property			21,605.85

Plaintiff's Exhibit No. 4—Continued

Deferred Debits:		
Licenses	1,624.50	
Insurance	124.73	
Interest	461.34	
Miscellaneous	336.24	
Total Deferred Debits		2,546.81
Total Assets		73,281.88

Liabilities and Capital

Current Liabilities:		
Notes Payable—Bank	8,000.00	
Accounts Payable—Associated Cos.	14,295.44	
Accounts Payable—Trade	2,668.66	
Accounts Payable—Others	3,862.31	
Accrued Wages Payable	805.16	
Accrued Taxes Payable	6,451.12	
Accrued Insurance Payable	2,876.04	
Total Current Liabilities		38,978.73
Deferred Liabilities:		
Notes Payable on Equipment		6,398.90
Capital:		
Common Stock		1,000.00
Surplus:		
Earned Surplus	757.13	
Net Gain for 1941	26,147.12	
Total Surplus		26,904.25
Total Liabilities		73,281.88

[fol. 833]

Ziffrin, Incorporated

Statement of Income and Expenses as of November 29, 1941

	Eleven Months	
Income:		
Freight Revenue—Hired Trucks	$413,852.07	
Freight Revenue—Co.'s Trucks	62,500.96	
Other Operating Revenue	21,785.15	
Total Operating Revenue		498,138.18
Cost of Operation:		
Maintenance of Equipment—		
Repairs to Revenue Equipment	$8,947.83	
Servicing of Revenue Equipment	557.31	
Tires & Tubes for Rev. Equip.	10,019.12	
Total Maintenance of Equipment	19,524.26	

Plaintiff's Exhibit No. 4—Continued

Transportation Expenses—		
Supervision of Transp.—Wages	9,556.98	
Supervision of Transp.—Expenses	98.08	
Drivers & Helpers Wages	19,438.96	
Fuel for Revenue Equipment—Gas	7,960.03	
Fuel for Revenue Equipment—Diesel	733.53	
Oils & Greases for Revenue Equipment	1,042.11	
Purchased Transp.—Motor Carrier	23,199.21	
Purchased Transp.—Other	184,645.97	
Purchased Transp.—Deadheads	13,642.35	
Bridge Tolls	581.59	
Other Transp. Exp.—Meals & Lodgings	1,238.82	
Other Transp. Exp.—Fines	65.25	
Other Transp. Exp.—Other	3,211.18	
Total Transportation Expenses		263,825.00
Terminal Expenses—		
Terminal Employees Wages—Office	749.50	
Terminal Employees Wages—Docks	16,431.53	
Terminal Supplies & Expenses	896.80	
Coll. & City Dely.—Drivers Wages	31,146.59	
Coll. & City Dely.—Gasoline	90.25	
Coll. & City Dely.—Tires & Tubes	4.80	
Coll. & City Dely.—Repairs	35.84	
Local Cartage	4,584.02	
Joint Terminal Facilities	4,875.00	
Total Terminal Expenses		78,813.93
Traffic & Sales Expenses—		
Salesmen Salaries	4,344.87	
Salesmen Expenses	3,627.80	
Tariffs—Schedules—Wages	2,035.85	
Tariffs—Schedules—Expenses	45.70	
Other Sales Expenses	9.00	
Advertising	866.27	
Total Traffic & Sales Expenses		10,638.19

[fol. 534]

Effrin, Incorporated

Statement of Income and Expenses as of November 29, 1941

Insurance Expenses—		
Insurance & Safety—Salaries	$4,051.72	
Insurance & Safety—Expenses	492.36	
P L & P D Insurance	6,682.94	
Injuries & Damages	902.07	
Workmen's Compensation Insurance	1,435.06	
Cargo Insurance	8,415.24	
Cargo Losses	5,343.45	
Fire & Theft Insurance	266.74	
Collision Insurance	715.85	
Other Insurance	83.18	
Total Insurance Expenses		27,240.64

Plaintiff's Exhibit No. 4—Continued

Operating Tax Expenses—		
Gasoline	4,304.79	
Licenses	2,165.60	
Corporation	131.76	
Real & Personal Property	767.96	
Social Security	2,038.42	
Ind. U. C. Insurance Tax	4,654.94	
Federal Excise	165.17	
Gross Income Tax	1,197.76	
Other Taxes	2,813.34	
Total Operating Tax Expenses		19,166.26
Operating Rent Expenses—		
Joint Facility Rents		5,235.80
Depreciation Expenses—		
Depreciation on Equipment	9,576.83	
Total Cost of operating expenses		434,032.91
Gross Profits from operation		64,105.57
Administration Expenses:		
Officers' Salaries	9,533.46	
Officers' Expenses	8,799.22	
Office Salaries	5,496.92	
Law Expenses	1,977.39	
Office Supplies	580.44	
Postage	333.94	
Telephone	4,154.62	
Outside Auditing Service	186.00	
Employees Welfare Expenses	1,645.29	
Other General Office Expenses	1,753.60	
Interest on Equipment Obligations	2,537.87	
Interest on Bank Loans	936.76	
Total Administration Expenses		37,916.45
Net Gain for 1941		26,147.12

[fols. 835-836] Clerk's Certificate to foregoing Exhibits omitted in printing.

[fol. 837] [File endorsement omitted]

In the District Court of the United States

[Title omitted]

Praecipe for Transcript of Record—Filed June 15, 1942

To the Clerk of the District Court of the United States for the Southern District of Indiana:

Please prepare and certify a transcript of the record in the above entitled cause in the matter of appeal therein

to the Supreme Court of the United States, and include in said transcript in the order given below, the following:

1. Complaint and petition for injunction filed October 21, 1941, together with exhibits thereto.

2. Order entered October 28, 1941 designating and assigning the Honorable Sherman Minton, United States Circuit Judge for the Seventh Circuit, the Honorable Robert C. Baltzell, United States District Judge, and the Honorable John P. Barnes, United States District Judge, to act as judges in the above entitled cause.

3. Notice that on October 28, 1941 plaintiff would apply for interlocutory injunction.

[fol. 838] 4. Application and motion for interlocutory injunction filed October 29, 1941.

5. Answer of defendant Interstate Commerce Commission filed November 17, 1941.

6. Answer of defendant United States of America filed November 17, 1941.

7. Pages 1 to 33 inclusive of the Official Reporter's transcript of evidence given on the hearing at Indianapolis, January 17, 1942.

8. Plaintiff's exhibits numbers 1 to 4 inclusive, introduced in evidence at the hearing at Indianapolis, January 17, 1942.

9. Brief of Ziffrin, Incorporated, plaintiff, including suggested findings of facts and conclusions of law.

10. Special findings of fact filed June 4, 1942.

11. Conclusions of law filed June 4, 1942.

12. Judgment entered June 4, 1942.

13. Waiver of all notices by Attorney General of the State of Indiana dated June 4, 1942.

14. Notice to defendants that petition for appeal would be presented June 10, 1942.

15. Notice to defendants that motion for injunction pending appeal would be presented June 10, 1942.

16. Petition for appeal to Supreme Court of the United States.

17. Assignment of errors.

18. Jurisdictional statement.

19. Order allowing appeal.

20. Citation on appeal.

21. Verified petition for injunction pending appeal.

[fol. 839] 22. Application and motion for injunction pending appeal.

23. Injunction pending appeal.
24. Motion to transmit original record.
25. Order to transmit original record.
26. Notice and receipt of service of petition for appeal, order allowing appeal, assignment of errors, statement as to jurisdiction, citation and directing attention to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court.
27. Praecipe for record including receipt of service.

Dated this 15th day of June, 1942.

Howell Ellis, John S. Powell, Attorneys for Ziffrin, Incorporated.

Service of the foregoing Praecipe for Transcript of Record and the receipt of a copy thereof are hereby acknowledged this 15 day of June, 1942, and it is hereby agreed that the matters set forth in said Praecipe shall constitute the entire transcript of record in this appeal.

(S.) B. Howard Caughran, Paul A. Pfister, Attorneys for Appellees.

[fol. 840] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 841-842] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF RECORD—Filed July 30, 1942

Pursuant to Rule 13, paragraph 9, of the Revised Rules of the Supreme Court of the United States, appellant states that it intends to rely upon all the points of its assignment of errors.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for consideration of the points relied upon.

Howell Ellis, Attorney for Appellant.

Service acknowledged this 27 day of July, 1942, and appellees hereby consent to the designation of record made above by appellant.

B. Howard Coughran, Paul A. Pfister, Attorneys for Appellees.

[fol. 843] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 12, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 46739, S. Indiana, D. C. U. S. Term No. 245. Ziffrin, Incorporated, Appellant vs. The United States of America and Interstate Commerce Commission. Filed July 20, 1942. Term No. 245 O. T. 1942.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 245

ZIFFRIN, INCORPORATED,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTER-STATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

STATEMENT AS TO JURISDICTION.

HOWELL ELLIS,
JOHN S. POWELL,
Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

No. 448 Civil

ZIFFRIN, INCORPORATED, A CORPORATION,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

JURISDICTIONAL STATEMENT.

Filed June 10, 1942.

---

1. The jurisdiction of the Supreme Court of the United States to entertain this appeal is believed to be sustained by Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150, and by Act of Congress of October 22, 1913, Chapter 32, 38 Stat. 220, United States Code, Title 28, Sec. 47a, being section 210 of Judicial Code.

2. The final judgment sought to be reviewed was entered in the above entitled action on June 4, 1942, and the application of plaintiff for appeal was presented on June 10, 1942.

3. This action does not involve the validity of any statute of any State or of any statute or treaty of the United States.

4. The nature of this case and action, the nature of the rulings of the court which were such as to bring this case within the jurisdictional provisions relied upon, a statement of the grounds upon which it is contended that the questions involved are substantial, and citations to the cases believed to sustain the jurisdiction, are next set forth under paragraphs hereof indicated (a), (b), (c) and (d), respectively, to-wit:

(a) Nature of the case.—The action, instituted October 21, 1941, in the District Court of the United States for the Southern District of Indiana, is one in which the plaintiff, Ziffrin, Incorporated, an Indiana corporation, seeks to obtain interlocutory and permanent injunctions to vacate, set aside and enjoin the enforcement of a certain order of the Interstate Commerce Commission entered May 29, 1941, in its Docket No. MC 2511 entitled Ziffrin, Incorporated Contract Carrier Application. The vacation of said order of the Interstate Commerce Commission and restraint of its enforcement are sought upon the grounds that said order deprives plaintiff of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States. This action arises under the Fifth Amendment to the Constitution of the United States, and under the laws of the United States, and more particularly under 54 Stat. 916, being section 17 (9) of Part I of the Interstate Commerce Act, United States Code, Title 49, Sec. 17 (9); and Section 205 (g) of Part II of the Interstate Commerce Act, Acts of Congress August 9, 1935, Ch. 498, 49 Stat. 548, and amended June 29, 1938, Ch. 811, Secs. 5-7, 52 Stat. 1237, 1238; United States Code, Title 49, Sec. 305 (g); and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220, United States Code, Title 28, Secs. 41 (28), 43-48, 45a and 47a. Said application for interlocutory and permanent injunctions were presented to the United States District

Court for the Southern District of Indiana and to the Honorable Robert C. Baltzell, Judge thereof, who thereupon and conformably with the provisions of the Act of Congress of October 22, 1913, Ch. 32, 38 Stat. 220, called to his assistance to hear and determine said applications the Honorable Sherman Minton, Circuit Judge, and the Honorable John P. Barnes, District Judge. Answers were filed by defendants and at the hearing on the application for an interlocutory injunction, by agreement of counsel for all parties, defendant Interstate Commerce Commission agreed to extend the date of the taking effect of its order pending the determination of this action on final hearing and the date of taking effect of said order complained of was extended until June 5, 1942. The District Court did not rule on the application for interlocutory injunction.

On January 17, 1942, the action was submitted after final hearing and argument. On February 4, 1936, Ziffrin, Incorporated, an Indiana corporation, filed its application with the Interstate Commerce Commission pursuant to Acts of Congress, August 9, 1935, Ch. 498, 49 Stat. 552, being Section 209 (a) of the Motor Carrier Act of 1935, for a permit authorizing it to continue its operations as a contract carrier of property by motor vehicle in interstate and foreign commerce from certain designated points in Indiana to points and places in Indiana, Ohio, Kentucky, Illinois, Western Iowa, Southeastern Wisconsin, West Virginia, to Buffalo, New York, Pittsburgh, Pennsylvania, and St. Louis, Missouri over irregular routes. After proceedings had in accordance with the rules and regulations of the Interstate Commerce Commission on May 29, 1941, the Interstate Commerce Commission issued its order denying plaintiff's application in toto and requiring plaintiff to cease all of its operations in interstate and foreign commerce, as aforesaid, finding that plaintiff and Ziffrin Truck Lines, Inc., a common carrier, were owned, controlled and managed

in a common interest, and that the continued operation of plaintiff and said Ziffrin Truck Lines, Inc. would not be consistent with the public interest and with the national transportation policy in view of the provisions of Acts of Congress June 29, 1938, Ch. 811, Sec. 10, 52 Stat. 1238 as amended, Act of Congress September 18, 1940, Ch. 722, Title I, Sec. 21 (b), 54 Stat. 923, being Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940. Reconsideration of said order of May 29, 1941, was denied by the Interstate Commerce Commission on September 29, 1941, and on October 21, 1941, this action was begun in the United States District Court for the Southern District of Indiana. On June 4, 1942, the District Court of the United States for the Southern District of Indiana filed its Special Finding of Fact and Conclusions of Law and entered final judgment dismissing this cause for want of equity. A copy of said Special Findings of Fact and Conclusions of Law and Judgment are attached hereto as Appendix A.

(b) The rulings of the Statutory Three-Judge Court which heard the case were such as to bring the case within the jurisdictional provisions relied upon because said ruling dismissed the case for want of equity and said final judgment of said court denied plaintiff a permanent injunction enjoining the enforcement of said order of the Interstate Commerce Commission approved May 29, 1941, in its Docket No. MC 2511 entitled Ziffrin, Incorporated Contract Carrier Application.

(c) The questions involved are substantial in that the case involves the right of plaintiff to continue a lawful business which has been in continuous existence since 1933 and which had gross revenues for the first eleven months of 1940 of $498,138.18. The record shows the value of the business to be $500,000.00, and the plaintiff fur-

nishes employment to one hundred and fifty employees with an annual payroll of $150,000.00. The order of the Interstate Commerce Commission approved May 29, 1941, and the judgment of the Statutory Three-Judge Court dismissing this case excludes plaintiff from continuing its lawful business as a contract carrier of property and deprives plaintiff of its property without due process of law, and discriminates against plaintiff and in favor of common carriers of freight by motor vehicle without any proper ground for such differentiation. The cases showing the questions involved to be substantial are:

Michigan Pub. Util. Comm. v. *Duke*, 266 U. S. 570, 69 L. Ed. 445;

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623;

Bush & Sons Co. v. *Maloy*, 267 U. S. 317, 69 L. Ed. 627;

Frost Trucking Co. v. *Railroad Com.*, 271 U. S. 583, 70 L. Ed. 1101;

Smith v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264;

Allen v. *Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463.

(d) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to entertain this appeal are:

Baltimore and Ohio R. Co. v. *United States* (1936), 298 U. S. 349, 80 L. Ed. 1209;

St. Joseph Stockyards v. *United States* (1936), 298 U. S. 38, 56 Sup. Ct. Rep. 120, 80 L. Ed. 1033;

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Interstate Busses Corp. v. *Holyoke Street R. Co.*, 273 U. S. 45, 71 L. Ed. 530;
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Kroger Grocery & Baking Co. v. *Lewis* (heard and reported with *Stewart Dry Goods Co.* v. *Lewis*), 287 U. S. 9, 77 L. Ed. 135;
Allen v. *Galveston Truck Line Corporation*, 289 U. S. 708, 77 L. Ed. 1463;
Spielman Motor Sales Co. v. *Dodge*, 295 U. S. 89, 79 L. Ed. 1322;
Bingaman v. *Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928;
South Carolina State Highway Department v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 469.

5. It is claimed that the Statutory Three-Judge Court abused its discretion in denying the permanent injunction aforementioned in that said court erred in applying to a record made and facts existing before September 18, 1940, an Act of Congress September 18, 1940, Ch. 722, Title I, Sec. 16, 21 (a), 54 Stat. 919, 923, being Sec. 210 of Part II of the Interstate Commerce Act, United States Code, Title 49, Section 310.

6. The plaintiff appends hereto, marked "Appendix A", a copy of the Special Findings of Fact and Conclusions of

Law and the Judgment of the aforesaid Statutory Three-Judge Court dated, filed and entered June 4, 1942, which by the terms and provisions of the final judgment appealed from, constitutes the sole grounds for the court taking the action and making the rulings and decisions complained of upon this appeal. No other opinions were issued in this case.

Howell Ellis,
John S. Powell,
520 Illinois Building,
Indianapolis, Indiana,
Attorneys for Plaintiff.

APPENDIX "A".

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

No. 448 Civil.

Ziffrin, Incorporated, a Corporation,

vs.

United States of America, Interstate Commerce Commission.

Before the Honorables, Sherman Minton, U. S. Circuit Judge, and Robert C. Baltzell and John P. Barnes, District Judges.

Come now the parties by their respective attorneys and the Court having heard the evidence and argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

Upon the foregoing special findings of fact and conclusions of law, it is,

Ordered, Adjudged and Decreed:

1. That this cause be and the same is hereby dismissed for want of equity.

2. That the defendants recover of and from the plaintiff their costs, herein taxed at $——.

(Signed) Sherman Minton,
Judge, United States Circuit Court of Appeals.
Robert C. Baltzell,
Judge, United States District Court.
John P. Barnes,
Judge, United States District Court.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

CIVIL ACTION.

No. 448.

ZIFFRIN, INCORPORATED, a Corporation, et al., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., *Defendants*.

Special Findings of Fact.

Pursuant to Rule 52 of the Rules of Civil Procedure, the court now states its Special Findings of Fact, as follows:

I.

That, on February 4, 1936, the plaintiff, Ziffrin, Incorporated, of Indianapolis, Indiana, filed an application with the Interstate Commerce Commission pursuant to section 209 (a) of the Motor Carrier Act, 1935, for a permit authorizing the continuance of operations as a contract carrier by motor vehicle in interstate commerce or foreign commerce of general commodities from certain designated points in Indiana to points and places in Indiana, Ohio, Kentucky, Illinois, western Iowa, southeastern Wisconsin, West Virginia, to Buffalo, New York, Pittsburgh, Pennsylvania and St. Louis, Missouri, over irregular routes.

II.

That this application was referred to a field representative of the Commission to investigate the nature and extent of plaintiff's operations, and, as a result of his report, the Commission, on March 5, 1938, issued a so-called compliance order authorizing plaintiff to engage in contract carrier transportation by motor vehicle according to specifications set forth therein. This order provided for the filing of protest within thirty days of its entry; such protest was duly filed; the compliance order was vacated pursuant to its terms; and the application was set down for formal hearing before an examiner.

III.

That the protest referred to above called the Commission's attention particularly to the relationship of plaintiff to Ziffrin Truck Lines, Inc., a common carrier, disclosed by Commission's Docket No. MC-2510, and alleged that issuance of a permit to plaintiff would violate section 210 of the Motor Carrier Act.

IV.

That, accordingly, the notice of hearing on plaintiff's application stated that inquiry would be made into the relationship between plaintiff and Ziffrin Truck Lines, Inc. in the light of the provisions of section 210 of the Motor Carrier Act, 1935. Reference was made to section 5(6) of Part I of the Interstate Commerce Act as then constituted, for the purpose of indicating that the scope of the inquiry would include the question as to control or management in a common interest of the plaintiff and Ziffrin Truck Lines, Inc.

V.

That, in due course, plaintiff's application was referred to an examiner. Evidence was fully developed by plaintiff and other parties to the proceeding on the issues raised by the application, the protest and the notice of hearing.

VI.

That, after an unfavorable report by the examiner, the case was reviewed by Division 5 of the Commission on plaintiff's exceptions to the examiner's report and on oral argument. On May 29, 1941, the Division issued a report finding that plaintiff was in operation on July 1, 1935, and continuously since that time as a contract carrier of certain commodities between specified points and destinations. A permit was denied, however, because it was found that plaintiff and Ziffrin Truck Lines, Inc., the common carrier, was owned, controlled and managed in a common interest, and that under section 210 of the Act the holding of a permit by the plaintiff authorizing contract carrier operations would not be consistent with the public interest and with the national transportation policy. Plaintiff's application for reconsideration was denied by the full Commission on September 29, 1941.

VII.

That the complaint in this case was filed on October 21, 1941, and answers were duly filed on behalf of the United States and the Interstate Commerce Commission. Argument was had and the case submitted on final hearing on January 17, 1942. At the hearing plaintiff introduced in evidence a certified copy of the record before the Interstate Commerce Commission, and certain additional evidence designed to show the extent of the damage to plaintiff from the operation of the Commission's order.

VIII.

That on the issue order section 210 as to the relationship between Ziffrin Truck Lines, Inc., the common carrier, and plaintiff, the record before the Commission showed that Sam Ziffrin was the president and general manager of both concerns. At the time of the hearing the board of directors, the officers and the sole stockholders of the plaintiff corporation were Sam Ziffrin, Mrs. R. Levi, S. O. Berman, and Lewis Berger. Mrs. Levi is Sam Ziffrin's sister. Apparently she took some part in the corporate affairs; Ziffrin testified that she attended directors' meetings regularly. The position of Berger and Berman was not entirely clear on the record. Ziffrin testified that Berger had not attended a directors' meeting in over two years, and Berman had attended only one meeting during the year preceding the hearing. The stock of plaintiff corporation consisted of 1,000 shares. Sam Ziffrin owned 495 shares, and his sister, Mrs. Levi, owned 15 shares. Mr. Berman owned 390 shares and Mr. Berger 100 shares. In the common carrier company Sam Ziffrin owned 98 per cent of the stock, and the remaining 2 per cent was owned by members of his family. The officers, directors and stockholders of that concern were Sam Ziffrin, Esther Ziffrin, his wife, and David and Lewis Ziffrin, his sons. Mrs. Ziffrin was also assistant treasurer of the plaintiff corporation. Other evidence of close relation between the two companies is to be found in the joint use of equipment and employees, which the record plainly disclosed. Sam Ziffrin represented both the common and contract carriers in their dealings with shippers.

IX.

That there was sufficient substantial evidence presented to the Commission to sustain its conclusion and order.

(Signed) SHERMAN MINTON,
Judge, United States Circuit Court of Appeals.
ROBERT C. BALTZELL,
Judge, United States District Court.
JOHN P. BARNES,
Judge, United States District Court.

Dated this 4th day of June, 1942.

Conclusions of Law.

Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows, to-wit:

I.

That the law is with the defendants; that there is substantial evidence to support the order of the defendant, Interstate Commerce Commission, and the complaint should be dismissed for want of equity.

II.

That the defendants should recover of and from the plaintiff their costs herein, taxed at $——.

(Signed) SHERMAN MINTON,
Judge, United States Circuit Court of Appeals.
ROBERT C. BALTZELL,
Judge, United States District Court.
JOHN P. BARNES,
Judge, United States District Court.

Dated this 4th day of June, 1942.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 245

ZIFFRIN, INCORPORATED,
Appellant,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Appellees.

BRIEF FOR APPELLANT

IRA HOWELL ELLIS,
JOHN S. POWELL,
520 Illinois Building,
Indianapolis, Indiana,
Counsel for Ziffrin, Incorporated, Appellant.

November 28, 1942.

Central Publishing Company, Indianapolis, Ind.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 245

ZIFFRIN, INCORPORATED

Appellant,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Appellees.

BRIEF FOR APPELLANT

I. REFERENCE TO OFFICIAL REPORT OF OPINION BELOW

No opinion was delivered in the court below. The special findings of fact and conclusions of law filed and the judgment entered in the court below are not officially reported, but are set forth in full in Appendix "A" of this brief.

II. GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The judgment of the district court was entered June 4, 1942. (R. 66.) The petition for appeal (R. 68, 69,

70, 71) was filed June 10, 1942 and the order allowing the appeal (R. 73) was entered the same day. On October 12, 1942 this court noted probable jurisdiction. (R. 458.) Jurisdiction is conferred on this court by Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150 and by the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220, United States Code, Title 28, Sec. 47a, section 210 of Judicial Code.

This action arises under the Fifth Amendment to the Constitution of the United States and under the laws of the United States, 54 Stat. 916, Section 17 (9) of Part I of the Interstate Commerce Act, United States Code, Title 49, Sec. 17 (9); Section 205 (g) of Part II of the Interstate Commerce Act, 49 Stat. 550, 54 Stat. 922, United States Code, Title 49, Sec. 305 (g); and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220, United States Code, Title 28, Sec. 41 (28), 43-48, 45a and 47a.

Jurisdiction of the Supreme Court of the United States is invoked on the grounds that the judgment of the district court (R. 66) which dismissed appellant's petition (R. 1-44, Ex. 1, R. 85) for an order to vacate, set aside and permanently enjoin the enforcement of a certain order of the Interstate Commerce Commission entered May 29, 1941, in its docket No. MC 2511, entitled Ziffrin, Incorporated, Contract Carrier Application (R. 13-36, Ex. 1, R. 85), deprives appellant of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States and is contrary to law.

The order of the Interstate Commerce Commission entered May 29, 1941 in its docket No. MC 2511, entitled Ziffrin, Incorporated, Contract Carrier Application, (R. 13-36, Ex. 1, R. 85), is reported at 28 M. C. C. 683.

The effect of said order of the Interstate Commerce Commission and the judgment of the court below is to totally destroy the business of appellant which is of a value of not less than five hundred thousand dollars. (R. 89, 90, 91.)

III. STATEMENT OF THE CASE

This case comes before this court on appeal (R. 73) from the judgment (R. 66) of a specially constituted statutory three judge court sitting as the United States District Court for the Southern District of Indiana, (R. 46) and involves the validity of an order of the Interstate Commerce Commission entered May 29, 1941, in its cause No. MC 2511. (R. 13-36, Ex. 1, R. 85.)

The appellant, Ziffrin, Incorporated, plaintiff below, seeks in this action to restrain and enjoin the appellees, United States of America and Interstate Commerce Commission, defendants below, from enforcing the provisions of an order of the appellee, Interstate Commerce Commission, and to vacate and set aside said order, denying appellant the right to continue in operation as a contract carrier of property by motor vehicle in interstate and foreign commerce, (R. 13-36, Ex. 1, R. 85), a business in which appellant has been continuously engaged since 1933. (R. 363, Ex. 3, R. 85.) Hereafter in this brief, reference to the appellee will mean the appellee, Interstate Commerce Commission, unless specific reference is made to the appellee, United States of America.

In the court below, appellant's complaint was dismissed for want of equity which had the effect of sustaining the validity of the order of the appellee, Interstate Commerce Commission, involved herein. (R. 66.) The order complained of found that appellant has operat-

ing rights under the so-called "grandfather" clause of the Motor Carrier Act of 1935, by reason of bona fide operation on July 1, 1935 and continuously since, but denied a permit to appellant to continue said operation because appellant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle engaged in interstate commerce, were owned, managed and controlled in a common interest and the holding of a permit by appellant would not be consistent with the public interest. (R. 33, 34, Ex. 1, R. 85.)

The taking of evidence before the Interstate Commerce Commission was concluded September 13, 1938 (R. 356, Ex. 3, R. 85) at which date the statute applicable to the holding at the same time of a certificate and a permit was 49 Stat. 554, the original Sec. 210 of the Motor Carrier Act of 1935, effective August 9, 1935. Two years after the taking of evidence, to-wit, on September 18, 1940, said section 210 of the Motor Carrier Act of 1935 was amended, 54 Stat. 919, 923, U. S. Code, Title 49, Sec. 310. On May 29, 1941 the Interstate Commerce Commission entered the order complained of (R. 35, Ex. 1, R. 85) and on September 29, 1941 appellant's petition for rehearing was denied (R. 44, Ex. 1, R. 85) which denial of rehearing, unless relief is granted by this court, forever precluded appellant from submitting evidence to show its compliance with said Section 210 as amended on September 18, 1940.

The appellee construes said original Section 210, 49 Stat. 554 as prohibiting the issuance of a permit to appellant. (R. 32, Ex. 1, R. 85.) Appellant construes said original Section 210, 49 Stat. 554 as not applicable to appellant, which was one of two separate corporate identities, under common management and control effectuated prior to the passage of the Motor Carrier Act of 1935. (R. 262, 263, 363, 370, Ex. 3, R. 85.)

The appellant, Ziffrin, Incorporated, is an Indiana corporation having its principal place of business at Indianapolis, Indiana, and was organized in March, 1933. (R. 363, Ex. 3, R. 85.) The appellant has been continuously engaged in the transportation of property by motor vehicle in interstate and foreign commerce since 1933, and was particularly so engaged on July 1, 1935 (the "grandfather" date of the Motor Carrier Act for contract carriers) and continuously since. (R. 255, Ex. 3, R. 85.)

On February 4, 1936 the appellant, Ziffrin, Incorporated, seasonably filed with the Interstate Commerce Commission under Section 209a, the so-called contract carrier "grandfather" clause of the Motor Carrier Act of 1935, 49 Stat. 552, U. S. Code, Title 49, Sec. 309, quoted in Appendix B of this brief, its application, as later amended, for a permit authorizing continuance of its operations alleging that it had been continuously since prior to July 1, 1935 engaged in interstate and foreign commerce as a contract carrier of canned, preserved and prepared foodstuffs, shoe polish and dressings, packing house products and fresh meats, alcoholic liquors, distillery supplies, including bottles, milk, condensed and evaporated, dairy products, including oleomargarine, cheese, paper products and paper articles, steel and iron articles and batteries between all points and places in that part of the state of Kentucky within a radius of 150 miles of Louisville, all the State of Indiana, all of the State of Ohio, all of the State of Illinois, St. Louis, Missouri, Milwaukee, Wisconsin, and points in Wisconsin intermediate between Milwaukee and Chicago and that part of the State of Pennsylvania in and around the cities of Pittsburgh and Schenley. (R. 94A, 94B, 94C, 94D, 106, Ex. 2, R. 85.)

This application was received by the appellee and docketed as its case No. MC-2511. (R. 14 Ex. 1, R. 85.) On

the same date and at the same time, Ziffrin Truck Lines, Inc., the common carrier company heretofore referred to, filed its application under the "grandfather" clause of the Motor Carrier Act for common carriers, being Section 206a of the Motor Carrier Act of 1935, 49 Stat. 551, U. S. Code, Title 49, Sec. 306, which application was received by the Interstate Commerce Commission, made the subject of certain hearings without reference to the application of appellant, and said application of said Ziffrin Truck Lines, Inc., was granted by the appellee and a certificate as a common carrier issued to said Ziffrin Truck Lines, Inc., without reference to the questions raised against appellant by appellee. The proceedings had in reference to said common carrier are reported at 6 M. C. C. 722.

The appellant was not a party to any of the proceedings had in connection with said common carrier, but the record made in the proceedings involving said common carrier was considered by the appellee in deciding the case of appellant, and portions of the record of said common carrier case to which appellant was not a party were made the determining factor of certain of the findings of the appellee. (R. 27, Ex. 1, R. 85.)

Following the filing of appellant's application with the appellee said application was referred by the appellee to the District Supervisor of its Bureau of Motor Carriers at Indianapolis to determine the operating rights of the appellant, and after showings made by appellant to said Supervisor, the appellant and said Supervisor entered into a written agreement dated August 23, 1937, in which the appellant agreed to restrict its operations to those set out in said agreement, and said Supervisor, as the agent of appellee, agreed that the appellant was entitled without further proceedings and without public

hearing to a permit to transport the commodities set out in said agreement to points and places set out in said agreement. (R. 36, 37, 38 Ex. 1, R. 85.)

On March 12, 1938 the appellee issued what it calls a compliance order stating that upon full compliance with Sections 215 and 218 of the Motor Carrier Act of 1935, a permit shall be issued authorizing appellant to engage as a contract carrier by motor vehicle in interstate and foreign commerce, said permit to authorize transportation of the commodities in the territory set out in an appendix attached to said compliance order, which appendix authorizes the same commodities and points and places as set out in the agreement with the Supervisor of the appellee. (R. 38, 39, 40, Ex. 1, R. 85.)

Appellant immediately fully and completely complied with the provisions of said compliance order, including the restriction of its operations to the territory and commodities set out therein, and continued its operations pursuant to the provisions of said compliance order. (R. 144, 145, Ex. 3, R. 85.)

On June 4, 1938, without any notice to appellant, the appellee issued its order in Cause No. MC-2511 vacating and setting aside its order of March 12, 1938. (R. 42, Ex. 1, R. 85.)

On June 23, 1938 the appellee issued its order stating that the application of appellant in Cause No. 2511 was set for public hearing on July 19, 1938 at Indianapolis, Indiana, and purporting to give notice to appellant that it would be required to make certain showings relative to the corporate relationship between appellant and Ziffrin Truck Lines, Inc., and also purporting to require appellant to make said showings pursuant to the provisions of nonapplicable sections of Part I of the Inter-

state Commerce Act dealing exclusively with railroads and having at that time no application whatsoever to motor vehicle carriers. (R. 43, Ex. 1, R. 85.)

The date of the hearing was changed by the appellee from July 19, 1938 to September 12, 1938, but no other change was made in the order and notice of June 23, 1938. (R. 107, 108, Ex. 3, R. 85.)

On September 12 and 13, 1938, public hearing was had on the application of appellant and on the matters set out in the order of the appellee dated June 23, 1938, before an examiner of the appellee. (R. 132, Ex. 3, R. 85.) Following the filing of briefs the examiner filed his report and order recommending the granting of a permit to appellant, but also recommending the curtailment of the authority theretofore issued to Ziffrin Truck Lines, Inc., in spite of the fact that Ziffrin Truck Lines, Inc., had never been made a party to this proceeding before appellee. (R. 109-130, Ex. 3, R. 85.)

The appellant filed its exceptions to the report and order recommended by the examiner, excepting in part only to the findings of said examiner. The appellant requested an opportunity to present oral argument in support of its exceptions. (R. 422, Ex. 3, R. 85.)

On May 26, 1939 the appellee permitted the intervention as parties in said proceeding, three protestant motor carriers, although the hearing had been completed, briefs had been filed, and an examiner's report had been made. (R. 15, Ex. 1, R. 85.)

On October 27, 1939 oral argument was held before Division 5 of the appellee in said proceedings at Washington, D. C., at which time the appellant and certain other parties presented argument to said division of the appellee. (R. 422, Ex. 3, R. 85.)

The case was submitted to said Division 5 for decision on October 27, 1939, but said Division 5 did not decide said case for a period of nineteen months, or almost two years, and until after Section 210 of Part II of the Interstate Commerce Act had been amended by Congress, completely changing the law applicable to the evidence taken at the public hearing held September 12 and 13, 1938. (R. 13, Ex. 1, R. 85.)

On May 29, 1941 Division 5 of the appellee issued its order in Cause No. MC-2511 to be effective July 15, 1941, completely denying appellant's application, which order is the order complained of in this action. (R. 35, 36, Ex. 1, R. 85.)

On June 25, 1941 appellant filed with the appellee its petition seeking reconsideration, reargument and rehearing of its application, and requesting oral argument on said petition.

The appellee extended the effective date of the denial order of May 29, 1941 to October 15, 1941, and again extended the effective date to November 5, 1941. (R. 131, 132, Ex. 3, R. 85.)

On September 29, 1941 the appellee denied appellant's petition filed June 25, 1941 for reconsideration, reargument and rehearing. (R. 44, Ex. 1, R. 85.)

On October 21, 1941 appellant filed its complaint in the United States District Court for the Southern District of Indiana, seeking a temporary restraining order, interlocutory injunction and final decree, vacating, setting aside and enjoining the enforcement of the order of the appellee dated May 29, 1941. (R. 1.)

On October 27, 1941 a partial hearing was held before a three judge court on appellant's motion for an inter-

locutory injunction, and at that time, upon the suggestion of the court, the appellee agreed to extend the effective date of its order beyond November 5, 1941, which made it unnecessary to proceed further on appellant's application for an interlocutory injunction. (R. 48.)

Final hearing before the court below was held on January 17, 1942, and thereafter the judgment of the court below was entered as heretofore set out. (R. 78, 66.) Although the court below dismissed the appellant's complaint or want of equity, it nevertheless granted appellant a temporary injunction restraining the appellees from forcing the order complained of pending determination of this appeal by this court, (R. 76, 77); and appellant is now operating under the protection of said injunction.

At the outset of the hearing of evidence by the examiner of the appellee on September 12, 1938, which is the evidence upon which the appellee based its decision, the appellant, by its counsel, protested against being required to participate in a hearing ordered by a notice requiring appellant to make certain showings under a law not then applicable to appellant or any other motor carrier, but applicable only to railroads. (R. 250, 251, 252, Ex. 3, R. 85.) The portion of the notice of hearing referred to which was included in the order of the appellee of June 23, 1938, is as follows:

> "Notice is hereby given that although application herein is for a certificate or permit on form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc. (No. MC 2510) and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of Section 5 (6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the pol-

icy declared in Section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of section 210 of said Motor Carrier Act, 1935." (R. 43, Ex. 1, R. 85.)

Appellant's objections to proceeding under this defective notice was overruled, (R. 252, Ex. 3, R. 85) and the hearing was divided into two sections, one having to do with applicant's operating rights under the Motor Carrier Act of 1935, and the other having to do with the matters set out in the portion of the notice referred to above. R. 136, 137, 138, Ex. 3, R. 85.) Appellant in that portion of the hearing before the appellee covering its relationship with Ziffrin Truck Lines, Inc., submitted evidence of its compliance with the then existing applicable law which was Section 210 of the Motor Carrier Act of 1935. (R. 252-356, Ex. 3, R. 85.)

The appellant, on September 12 and 13, 1938, through the testimony of Mr. Sam Ziffrin, of Indianapolis, Indiana, and certain documentary evidence, submitted proof to show the relationship which existed then and which had existed prior to the enactment of the Motor Carrier Act of 1935 between appellant and Ziffrin Truck Lines, Inc. (R. 252-356, Ex. 3, R. 85.) This is the evidence to which the appellee applied the amended section 210 quoted in its order, the law enacted September 18, 1940, more than two years later. Thereafter appellee denied appellant the right to submit evidence as to its compliance with said amended section 210. (R. 44, Ex. 1, R. 85.) The evidence before the appellee, which is in evidence in this proceedings, (R. 132-356, Ex. 3, R. 85), is that as of the date of the hearing September 12 and 13, 1938, and continuously since prior to the enactment of the Motor Carrier Act of 1935, appellant, Ziffrin, Incorporated, and Ziffrin Truck Lines, Inc., are and have been separate and distinct

corporations, (R. 363, 378, Ex. 3, R. 85), both having their principal place of business in Indianapolis, Indiana, (R. 367, 382, Ex. 3, R. 85), the appellant being engaged in business as a contract carrier of property by motor vehicle in interstate and foreign commerce, (R. 255, Ex. 3, R. 85) and Ziffrin Truck Lines, Inc., being engaged in business as a common carrier of property by motor vehicle in interstate and foreign commerce. (R. 256, Ex. 3, R. 85.)

The directors and stockholders of the appellant were, continuously since prior to the enactment of the Motor Carrier Act of 1935, as follows:

	No. of Shares
Sam Ziffrin, Indianapolis, Indiana, President	495
S. O. Berman, Logansport, Indiana	390
L. Berger, Averne, New York	100
Rose Levy, Indianapolis, Indiana (Sister of Mr. Ziffrin)	15
(R. 253, 297, 298, Ex. 3, R. 85.) Total shares	1,000

As to Ziffrin Truck Lines, Inc., the evidence is that Mr. Sam Ziffrin owned 98% of the stock, and that the remaining 2% was held by Esther Ziffrin, Mr. Sam Ziffrin's wife, Dave Ziffrin, their son, and Louis Ziffrin, their son, this company being entirely owned by Mr. Ziffrin, his wife and two sons, with no outside stock ownership whatsoever. (R. 254, Ex. 3, R. 85.) Certified copies of the Articles of Incorporation of the appellant, and Ziffrin Truck Lines, Inc., are in evidence. (R. 363, 378, Ex. 3, R. 85.)

The evidence is that the appellant since its organization has paid Federal Income Tax to the United States Government, (R. 256, Ex. 3, R. 85), and that Ziffrin Truck

Lines, Inc., since its organization has paid Federal Income Tax to the United States Government (R. 256, Ex. 3, R. 85); that the appellant has paid Gross Income Tax to the State of Indiana since the State Gross Income Tax Law was effective, (R. 256, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., has paid Gross Income Tax to the State of Indiana since the State Gross Income Tax Law has been in effect. (R. 256, Ex. 3, R. 85.)

The evidence further is that appellant pays the State and Federal government social security, unemployment compensation and other State and Federal taxes or assessments. (R. 257, Ex. 3, R. 85.)

The evidence further is that Ziffrin Truck Lines, Inc., pays to State and Federal governments social security, unemployment compensation and other State and Federal taxes or assessments. (R. 257, Ex. 3, R. 85.)

The evidence is that appellant had certain employees who worked exclusively for that company, and Ziffrin Truck Lines, Inc., had certain employees who worked exclusively for that company, and that there were certain employees such as auditors who did part time work for appellant and part time work for Ziffrin Truck Lines, Inc. (R. 257, Ex. 3, R. 85.)

The evidence further is that the books and records of the appellant are kept in accordance with the accounting regulations of the Interstate Commerce Commission and are separate and distinct records from those of any other company, and that the books and records of Ziffrin Truck Lines, Inc., (R. 258, Ex. 3, R. 85) are kept in accordance with the accounting regulations of the Interstate Commerce Commission and are separate and distinct from those of any other company. (R. 258, Ex. 3, R. 85.)

The evidence further is that an auditor of the appellee had recently completed an inspection of the books of both appellant and Ziffrin Truck Lines, Inc., and found this to be a fact. (R. 258, Ex. 3, R. 85.)

The evidence is that appellant holds an alcoholic beverage permit from the United States Government, Alcoholic Beverage Division, (R. 258, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., holds an alcoholic permit issued by the United States Government; (R. 258, Ex. 3, R. 85) that the State of Indiana had issued separate authority for the transportation of alcoholic liquors to appellant and to Ziffrin Truck Lines, Inc.; (R. 259, Ex. 3, R. 85) that the appellant holds a contract carrier permit issued by the Public Service Commission of the State of Indiana, (R. 261, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., holds a common carrier certificate issued by the Public Service Commission of Indiana. (R. 262, Ex. 3, R. 85.)

The evidence is that appellant holds a contract carrier permit issued by the State of Ohio, (R. 262, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., holds a common carrier certificate issued by the State of Ohio; (R. 262, Ex. 3, R. 85) that appellant owns and holds title to, in its own name, certain motor vehicle equipment, (R. 262, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., owns and holds title to certain motor vehicle equipment. (R. 262, Ex. 3, R. 85.)

The evidence further is that appellant does not exercise any control or management over Ziffrin Truck Lines, Inc., and that Ziffrin Truck Lines, Inc., does not exercise any control over the appellant, Ziffrin, Incorporated. (R. 262, Ex. 3, R. 85.)

The evidence further is that the services furnished by appellant and Ziffrin Truck Lines, Inc., are entirely dif-

ferent in that appellant since its organization has transported exclusively for certain persons, firms or corporations, and that it has never solicited freight generally or held itself out to serve the public generally since its organization, (R. 264, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., has held itself out as a common carrier to serve the general public for the transportation of commodities generally in interstate commerce (R. 264, Ex. 3, R. 85); that only a small portion of the territory heretofore granted to Ziffrin Truck Lines, Inc., by the appellee as a common carrier as to points of origin and destination is the same as that included in the application of appellant as amended (R. 34, 35, Ex. 1, R. 85; 139 Ex. 3, R. 85); that the appellant operates over irregular routes to points and places generally throughout a large territory, (R. 94B, 106, Ex. 2, R. 85) and that Ziffrin Truck Lines, Inc., is a common carrier operating a regular service over certain specific routes set out in the certificate issued by the appellee. (R. 34, Ex. 1, R. 85.)

The evidence further is that the corporate funds of the appellant and Ziffrin Truck Lines, Inc., are entirely separate and distinct and are kept in different banks in the city of Indianapolis, Indiana (R. 316, 317, Ex. 3, R. 85); that where there had been any temporary interchange of equipment between appellant and Ziffrin Truck Lines, Inc., that it had been of the same nature which occurs daily by and between other motor carriers, and that particularly one of the protestant motor carriers in the proceedings before the appellee had interchanged equipment with the appellant in the same manner when said protestant did not have available sufficient trucks to take care of the business offered to it. (R. 328, Ex. 3, R. 85.)

The evidence further is that the appellant has been nationally recognized as a separate and distinct company

as a contract carrier, and that appellant's president at the time of the hearing before the appellee was Vice-President of the American Trucking Associations, Inc., and Chairman of the Contract Carrier Division thereof (R. 266, Ex. 3, R. 85); that the appellant had complied with all the rules and regulations of the appellee governing contract carriers, (R. 255, Ex. 3, R. 85) and had on file with and approved by the appellee bilateral contracts between the appellant and its shippers. (R. 141, Ex. 3, R. 85.)

The evidence further is that the appellant was organized prior to the enactment of the Motor Carrier Act of 1935 for a definite and specific purpose, to-wit, the transportation of alcoholic liquors and beverages (R. 145, Ex. 3, R. 85); that appellant had been requested by representatives of the major distilleries of the United States to undertake the transportation of liquor by reason of the chaotic condition existing in connection with said transportation immediately after the repeal of the prohibition amendment by reason of the hijacking of whiskey upon the public highways of the United States by organized gangsters. (R. 148, 149, Ex. 3, R. 85.) That the appellant pursuant to said request developed a police and convoy system for the protection of alcoholic liquors while in transportation, and that this system had been worked out with the cooperation of local police, state police and federal law enforcement officers in the territory involved. (R. 148, 149, Ex. 3, R. 85.) That this police and convoy system was being maintained by appellant at the cost of approximately Twenty-five thousand ($25,000.00) dollars a year in order to protect its shippers. (R. 148, 149, Ex. 3, R. 85.) That this service was special and peculiar service of the appellant as a contract carrier, and had no connection whatsoever with Ziffrin Truck Lines, Inc., or

any other carrier operating in the United States. (R. 264, 265, Ex. 3, R. 85.)

The appellant introduced evidence of representatives of shippers who had used appellant's service on, before and continuously since July 1, 1935, who testified in detail relative to their use of appellant's service on and after the "grandfather" date, naming with particularity cities and towns and territory where shipments had been transported for them by appellant.

B. M. ANGELL, general traffic manager of Stokely Brothers and Company and Van Camps, Incorporated. (R. 243, Ex. 3, R. 85.)

Mr. Angell testified that his companies are packers of canned fruits and vegetables, with plants throughout the United States, (R. 243, Ex. 3, R. 85) including eleven in the State of Indiana, (R. 243, Ex. 3, R. 85) and testified concerning the service which appellant had rendered to his companies in the transportation of their products in interstate and foreign commerce on, before and continuously since July 1, 1935. (R. 244, Ex. 3, R. 85.)

Mr. Angell testified that his companies had used the services of appellant for transportation of their products in interstate and foreign commerce on, before and continuously since July 1, 1935 in the territory involved in the application of appellant, as amended, (R. 244, Ex. 3, R. 85) which included that part of the state of Kentucky within a radius of 150 miles of Louisville, Kentucky, all points and places in the State of Indiana, all points and places in the State of Illinois, all points and places in the State of Ohio, St. Louis, Missouri, Milwaukee, Wisconsin, and that part of the State of Pennsylvania in and about Schenley and Pittsburgh, Pennsylvania. (R. 243, Ex. 3, R. 85,)

Mr. Angell testified that appellant's service under contract had been used particularly for the delivery of the products of his companies manufactured at their plants in the State of Indiana, which included plants located at Jeffersonville, Whiteland, Greenwood, Indianapolis, Martinsville, Anderson, Elwood, Tipton, Peru and Wabash, all in the State of Indiana. (R. 244, Ex. 3, R. 85.)

Mr. Angell testified that the destination points to which appellant had transported the products of his company from the Indiana canning plants were general throughout the territory included in the application, as amended, and particularly that the appellant had transported the products of his companies to all points and places of 5,000 population or more in the territory included in appellant's application, as amended. (R. 244, Ex. 3, R. 85.)

Mr. Angell further testified that the shipping records of his companies had been largely destroyed when their Jeffersonville, Indiana, warehouse was flooded by the disastrous Ohio River flood of 1936. (R. 245, Ex. 3, R. 85.) He further testified that his companies shipped approximately eight million pounds of merchandise a month by the appellant to points and places in the territory involved, (R. 245, Ex. 3, R. 85) and for that reason he was unable to state details as to the dates, weights and rates of particular shipments from memory, (R. 245, Ex. 3, R. 85) his records having been destroyed in the flood of 1936. (R. 245, Ex. 3, R. 85.)

Mr. Angell testified that he had personally made the original arrangements with the appellant for the transportation of his companies in 1934, (R. 246, Ex. 3, R. 85) and that he had from time to time participated in the preparation and approval of the written contracts by

and between his companies and appellant covering the transportation of the products of his companies in the territory which he had described. (R. 246, 247, Ex. 3, R. 85.)

FRANK H. LUTHER, general traffic manager of Joseph E. Seagram & Sons, Inc., Calvert Distilleries Corp., Carstairs Brothers Company, Inc., Reliance Distilling Company, and other subsidiary companies, and also general traffic manager for the American plant of Seagram, Limited, of Montreal, Canada. (R. 175, Ex. 3, R. 85.)

Mr. Luther testified that his companies had used the services of the appellant for the transportation of alcoholic liquors on, before and continuously since July 1, 1935 in the territory incl[illegible]d in the application of appellant before appellee, as amended. (R. 177, Ex. 3, R. 85.)

Mr. Luther testified that in the so-called open states where there was not a state distribution of alcoholic liquors through state owned stores that the service of appellant had been used to points and places generally. (R. 176, Ex. 3, R. 85.) Mr. Luther testified that the open states involved were Indiana, Illinois, Wisconsin and Kentucky. (R. 176, Ex. 3, R. 85.) He further testified that in the so-called monopoly states where the distribution of alcoholic liquors was through the medium of state owned liquor stores, that the destinations to which applicant had transported alcoholic liquors were specific, and that such states involved in this matter were Pennsylvania and Ohio. (R. 177, Ex. 3, R. 85.)

As to Pennsylvania, Mr. Luther testified that in that portion of the state involved in this application appellant had transported alcoholic liquors to Pittsburgh and New Castle, and that in Ohio appellant had transported alcoholic liquors to Canton, Cleveland, Columbus, Cincinnati

and Toledo, all of said transportation having been performed on, before and continuously since July 1, 1935. (R. 176, Ex. 3, R. 85.)

Mr. Luther testified that the transportation of alcoholic liquors by appellant for his companies had been between Lawrenceburg, Indiana and Louisville, Kentucky, and the points and places generally in the open states and to specific points in the monopoly states. (R. 177, Ex. 3, R. 85.)

EDWARD GUSKEY, general traffic manager of Schenley Distilleries, Inc., which owns, among others, the following distilleries: Schenley Products Company, Schenley Import Corporation, Schenley Distillers Corporation, Schenley Distillers, Incorporated, Joseph Finch Company, Old Quaker Company, New England Distilling Company, George P. Stagg Company, James Pepper Company, Berhnheim Distilling Company, Belmont Distilling Company, George Dickel & Company, Steinhart Company. (R. 193, Ex. 3, R. 85.)

Mr. Guskey testified that his companies had used the services of appellant for the transportation of alcoholic liquors and distillers' supplies in the territory involved in appellant's application, as amended, on, before and continuously since July 1, 1935. (R. 196, 197, Ex. 3, R. 85.) Mr. Guskey testified that his companies had used the services of appellant under contract in interstate transportation, and that he personally had made arrangements for the transportation with appellant in 1934. (R. 202, 203, Ex. 3, R. 85.)

Mr. Guskey testified that he had made a study of the situation regarding the use of appellant's service by his companies, and that his companies had used appellant's service for the transportation of alcoholic liquors and dis-

tillers' supplies on, before and continuously since July 1, 1935, and particularly stated that the service had been used daily into the State of Ohio, to almost every point and place in the State of Illinois, to almost every point and place in the State of Indiana, to Racine, Wisconsin, Milwaukee, Wisconsin and St. Louis, Missouri. (R. 199, Ex. 3, R. 85.)

Mr. Guskey named with particularity some of the points and places in the territory which applicant had transported alcoholic liquors from Lawrenceburg, Indiana and Louisville, Kentucky, including the following cities and towns in Illinois:

> Alton, Aurora, Belleville, Bloomington, Blue Island, Cairo, Centralia, Champaign, Chicago, Chicago Heights, Danville, Decatur, Dixon, Dubuque (E), East St. Louis, Edwardsville, Elgin, Galesburg, Geneva, Glen Ellyn, Henin, Joliet, Kankakee, Lake Forest, LaSalle, Loda, Litchfield, Metropolis, Moline, Morton Grove, Mt. Carmel, Paris, Peoria, Pontiac, Quincy, Rock Island, Rockford, Springfield, Streator, Waukegan. (R. 361, 362 Ex. 3, R. 85.)

In the State of Indiana Mr. Guskey named as typical points the following:

> Aurora, Elkhart, Evansville, Fort Wayne, Indianapolis, Lafayette, Lawrenceburg, Logansport, Muncie, New Albany, South Bend, Terre Haute, East Chicago, Gary, Indiana Harbor, Hammond. (R. 361, 362, Ex. 3, R. 85.)

In Ohio Mr. Guskey testified that the points to which appellant's service has been used were:

> Canton, Cleveland, Columbus, Toledo, Cincinnati. (R. 362, Ex. 3, R. 85.)

Mr. Guskey testified that the bulk of the distillers' supplies which had been transported by applicant for his

companies consisted of glass bottles originating at Alton, Illinois, Dunkirk, Indiana, Indianapolis, Indiana, Terre Haute, Indiana, and Winchester, Indiana. (R. 198, Ex. 3, R. 85.)

Other shipper witnesses who testified concerning service which had been performed for them by appellant were:

M. F. CHANDLER, general traffic manager of Frankfort Distilleries, Inc., and Vice-President of the Kentucky Liquor Producers Traffic Association, whose members are: Brown-Forman Distillery Co., Bardstown Distilling Co., Inc., John A. Barry Distillery, Byrd Distilling Co., Calvert Distilleries Corp., Carstairs Distilleries, Cave Springs Distillery, Churchill Distilleries, Dant & Dant, Cummins Distillery, Davies County Distillery, Frankfort Distilleries, Inc., Glenmore Distilleries, Glencoe Distilling Co., Kentucky Valley Dist. Co., Labrot & Graham Distilleries, H. McKenna, Inc., Old Joe Distillery, K. Taylor Distilling Co., Old Lewis Hunter Distillery, Ripey Bros. Distillery, Joseph E. Seagram & Sons Co., Stitzel-Weller Distilleries, Wathen Distilleries, Woodford County Dist. Co., General Distillers of Kentucky. (R. 151-175, Ex. 3, R. 85.)

F. F. GILBERT, assistant traffic manager of Swift and Company and its subsidiaries. (R. 216-223, Ex. 3, R. 85.)

P. E. PERRY, general traffic manager of Kraft-Phoenix Cheese Company. (R. 223-227, Ex. 3, R. 85.)

R. C. JOHNSON, Treasurer of the Beveridge Paper Company of Indianapolis, Indiana. (R. 227-230, Ex. 3, R. 85.)

H. E. RUMRILL, traffic manager of the Standard Nut Margarine Company of Indianapolis, Indiana. (R. 231-237, Ex. 3, R. 85.)

In addition to the testimony of shippers, the appellant submitted certain documentary evidence relative to its operations on, before and after July 1, 1935, (R. 330, Ex. 3, R. 85.) but said documentary evidence was not as full and complete as that which had heretofore been submitted to appellee through its agent, the District Supervisor at Indianapolis in August, 1937, as heretofore pointed out. (R. 40, 41, 42, Ex. 1, R. 85.)

In connection with this documentary evidence of appellant's operations, there was submitted to the appellee the affidavit of its own agent, the District Supervisor heretofore referred to, showing that the documentary evidence available at the time of hearing was not as extensive as that which had been submitted to and examined by said District Supervisor, agent of the appellee, but the appellee specifically refused and failed to consider the affidavit of its own agent relative to these matters. (R. 24, Ex. 1, R. 85.)

Between the time of the taking of evidence by the appellee in September, 1938 and of the oral argument before Division 5 of the appellee on October 27, 1939, the second largest stockholder of the appellant, Mr. Sam Berman, of Logansport, Indiana, who was the owner of 390 out of a total of 1,000 shares of stock, died, and appellant felt it a duty in said oral argument to call this situation to the attention of the appellee, which was done by appellant. (R. 433, Ex. 3, R. 85.) But the appellee failed to recognize or take into consideration this fact in the order complained of, and decided the case upon the basis of the stock ownership which existed at the time of taking evidence in September, 1938, but in so doing erroneously stated the stock ownership as shown in the record before appellee, said erroneous statement being as follows:

"Another individual, also a director, who owns 49 percent of the stock, lives in the State of New York, and has not attended a meeting of applicant's board of directors for over 2 years." (R. 27, Ex. 1, R. 85.)

Although this erroneous statement was called to the attention of the appellee by the appellant, the appellee, although it has had opportunity to do so in subsequent orders, has not corrected this misstatement of the evidence in the order complained of. (R. 27, Ex. 1, R. 85.)

A certified copy of the evidence and the argument before the appellee, heretofore referred to in this memorandum, is in the record before this court. In the court below, the appellee, through its counsel, strenuously objected to the introduction of any new or additional evidence by appellant, and the only additional evidence which appellant was permitted to introduce in the court below referred to the value of the property of appellant, and the fact that the appellant would suffer irreparable injury if the order of the appellee is permitted to become effective. (R. 80-93.) This evidence showed the business of appellant to be substantial, and that its gross revenue for the first eleven months of the year 1941 amounted to $498,138.18, (R. 87, Ex. 4, R. 87.) The value of the business of the appellant was placed by one witness, the Treasurer of an Indianapolis Bank at $500,000.00, and by Mr. Ziffrin, appellant's President, at $750,000.00. (R. 89, 90, 91.)

Mr. Ziffrin testified that the effect of the order of the Interstate Commerce Commission would be totally to destroy the business and investment of the stockholders in the business of appellant. (R. 91.)

In view of the rulings of the appellee in proceedings before it, and in view of appellee's position in the court

below, and the rulings of the court below, this case now stands decided on evidence taken almost two years before the enactment of the law under which the decision was made, and the appellant has been denied any opportunity whatsoever to submit evidence as to the situation which now exists under the provisions of the new law.

IV. SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The appellant will urge the following assigned errors specified both in its assignment of errors and in its statement of points to be relied upon. (R. 72, 457.)

The United States District Court for the Southern District of Indiana erred:

1. In dismissing this cause for want of equity;

2. In determining and ruling, and in stating as its conclusions of law and as the basis of its judgment herein, the following:

   a. That the law is with the defendants;

   b. That there is substantial evidence to support the order of the defendant Interstate Commerce Commerce Commission; and

   c. That the complaint should be dismissed for want of equity;

3. In applying Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940, (54 Stat. 919, 923, U. S. Code, Title 49, Sec. 310) to both a record made and facts existing prior to that date by determining and finding and stating as its special finding of fact No. VIII, and as one of the bases of its judgment herein that under Section 210 as to the relationship between Ziffrin

Truck Lines, Inc., the common carrier, and plaintiff, the record showed certain relationships.

4. In determining and finding and stating as its special finding of fact No. IX and as one of the bases of its judgment herein that there was sufficient substantial evidence presented to the Commission to sustain its conclusion and order which include findings that:

a. The holding of a permit by the plaintiff authorizing contract carrier operations would not be consistent with the public interest and with the national transportation policy;

b. That Ziffrin, Incorporated, plaintiff, was not entitled to operating rights as to territory and commodities as stated in its application to the Interstate Commerce Commission, as amended.

V. ARGUMENT

A. Summary of the Argument

The argument for appellant is directed to the assigned errors which are in turn directed to the conclusions of law and findings of fact of the court below.

1. In dismissing appellant's complaint for want of equity the court below sustained the validity of the order of the appellee in cause No. MC-2511 decided May 29, 1941, and in so doing erred and deprived appellant of due process of law in:

(a) Sustaining the appellee in the exercise of power not conferred on it by law.

(b) Sustaining the appellee in making an ex post facto application of 54 Stat. 919, 923, Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940 to a record completed two years before the enactment of the statute without giving appellant an opportunity to be heard and show that it has fully complied with the provisions of said section, and

(c) Sustaining the appellee in depriving appellant of rights acquired under 49 Stat. 552, Section 209 (a) of the Motor Carrier Act of 1935 quoted in full in Appendix "B" to this brief, without proper notice and opportunity to be heard.

2. The ruling of the court below that there is substantial evidence to support the order of the defendant Interstate Commerce Commission is erroneous for the reason that said order of the Interstate Commerce Commission is based:

(1) In part upon findings made without evidence.

(2) In part upon findings made on evidence which clearly does not support them.

(3) In part upon findings predicated upon the rejection of uncontroverted evidence and

(4) In part on a record in another cause before appellee which was not made a part of the record in this cause.

All of these arbitrary acts are a denial of due process of law to appellant.

3. The court below erred in sustaining the appellee Interstate Commerce Commission in applying Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940 to both a record made and facts existing on a date more than two years prior to the enactment of said Section 210 of Part II of the Interstate Commerce Act, and in finding certain relationships as existing between appellant and Ziffrin Truck Lines, Inc., a common carrier, under the provisions of said section.

4. (a) The court below erred in sustaining the finding of the appellee Commission that a holding of a permit by appellant would not be consistent with the public interest and the national transportation policy for the reason that said finding of appellee Commission is based upon assumptions and not upon evidential facts in the record.

(b) The court below erred in sustaining the finding of the appellee as to the territory served and the commodities transported by appellant on, before and continuously since July 1, 1935, for the reason that appellee rejected uncontroverted evidence in making its findings. In making its findings relative to the territory served by appellant on, before and continuously since July 1, 1935 the appellee determined said operating rights to be vir-

tually identical with those of Ziffrin Truck Lines, Inc., a common carrier, when the uncontroverted evidence showed that appellant operated in a much wider territory.

The appellant concludes that it has been denied due process of law for the reason that its operating rights have been restricted as a result of the rejection of uncontroverted evidence and in finding that no permit should be issued by the application of Section 210 of Part II of the Interstate Commerce Act to a record made two years before when there was no prohibition in the law against the granting of a permit to appellant, and in that appellant has not been afforded an opportunity of submitting evidence of its compliance with Section 210 of Part II of the Interstate Commerce Act effective September 18, 1940. For the above reasons the cause should be reversed and remanded to the court below for further proceedings appropriate to the order of this court.

B. Text of Argument

The conclusions of law of the court below are most general in nature, and throw no light upon the legal questions involved in this case. In fact, the conclusions of law of the court below make no reference whatsoever to any legal propositions raised by the appellant, although these legal propositions were carefully set out in appellant's brief filed with the court below. Appellant has attempted to direct its assignment of errors to the general, vague and unsatisfactory conclusions of law made by the court below.

1. The first assigned error is that the United States District Court for the Southern District of Indiana erred in dismissing this cause for want of equity. (R. 72.) In dismissing appellant's complaint for want of equity,

the court below sustained the validity of the order of the appellee complained of.

In the order complained of, the appellee at 28 M. C. C. 695 under the caption "Applicability of Section 210 of the Act," sets out in full Section 210 of Part II of the Interstate Commerce Act as enacted September 18, 1940, 54 Stat. 919, 923, U. S. Code, Title 49, Sec. 310, and makes said section the basis of its order. The section follows:

> "Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and (2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, of any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

After quoting the above section of the law, the order of appellee at 28 M. C. C. 695 (R. 29, Ex. 1, R. 85) states:

> "Applicant contends that this section has no application to the facts under consideration because

(a) it and the common-carrier company are separate corporations, holding different types of State authority and rendering different services, (b) the two corporations were in existence prior to the enactment of Part II of the act, and (c) the application of the common-carrier company has been determined. Applicant also places much stress upon the fact that the section relates to the holding of dual authority by the same person and, in effect, argues that more than one person is here involved, because of the existence of the separate corporations."

There are several erroneous statements in the paragraph of the order just quoted. Appellant had not contended "that this section has no application to the facts under consideration," because at the time appellant had submitted evidence, September 12 and 13, 1938 (R. 356, Ex. 3, R. 85), had briefed the case, November 22, 1938, (R. 423) and had been heard in oral argument before the appellee October 27, 1939 (R. 422-452), the section referred to which became effective September 18, 1940 had not yet been enacted by Congress. The appellant has never been given an opportunity by the appellee to submit evidence, to file briefs or make arguments or any other contention on what its position is with regard to the provisions of said section (R. 44, Ex. 1, R. 85). As a matter of fact, both in the court below and now, the appellant freely admits that the section quoted has been applicable to appellant since its enactment, and if given an opportunity, appellant will offer evidence to show that it has fully complied with Section 210, effective September 18, 1940, quoted in the order complained of.

The evidence, the briefs and the oral argument upon which appellee based its decision were all taken and heard before September 18, 1940, when the law applied was enacted by Congress. When appellant learned through

the order complained of, which was approved May 29, 1941, that the appellee had applied to it a new law not in effect at the time of the hearing, briefing and argument, appellant promptly petitioned appellee for reconsideration and rehearing of this matter (R. 44, Ex. 1, R. 85) so that an opportunity would be afforded appellant to submit evidence as to its status under the new law, but said petition was denied. (R. 44, Ex. 1, R. 85.)

The statute as to dual control in effect on September 12 and 13, 1938, when hearing was had, (R. 132, 356, Ex. 3, R. 85) on November 22, 1938 when applicant's brief was filed, (R. 423) and on October 27, 1939 when oral argument was held and the cause was submitted to Division 5 of the Interstate Commerce Commission for decision, (R. 452, Ex. 3, R. 85) was 49 Stat. 554, the original Section 210 of the Motor Carrier Act of 1935 effective August 9, 1935, and was as follows:

> "No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in Section 202 (a) of this part."

It was and is appellant's contention that this section had no application to appellant which is one of two separate and distinct corporations which were under common management and control effectuated prior to the enactment of the Motor Carrier Act of 1935. There was no prohibition in the original Section 210 of the Motor Carrier Act of 1935, 49 Stat. 554, against the holding of a

certificate and a permit by separate and distinct corporations under common management and control effectuated prior to the passage of the Act and there was no such prohibition in any other section of the Interstate Commerce Act, but notwithstanding this fact the appellee attempted to apply to appellant provisions of Part I of the Interstate Commerce Act concerning common management and control and relating exclusively to future consolidations and mergers of rail carriers. (R. 43, Ex. 1, R. 85.) The portion of the order and notice of hearing referred to is as follows, 28 M. C. C. 692. (R. 25, Ex. 1, R. 85.)

> "Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC-2510), and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of section 5 (6), Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of section 210 of said Motor Carrier Act, 1935."

The appellant strenuously objected to proceeding with a hearing under nonapplicable law, Section 5 (6) of Part I quoted in full in Appendix C of this brief but as heretofore pointed out, was, nevertheless, required to proceed. (R. 250, 251, 252, Ex. 3, R. 85.) The appellee, in the order complained of, admits at 28 M. C. C. 693 that the section of Part I of the Interstate Commerce Act included in the notice and the requirements of hearing, was not applicable to appellee, in the following language:

"Applicant particularly questions the legality of any inquiry into the corporate relations between the two companies, because of the reference to section 5 (6) of Part I, of the Interstate Commerce Act, as then constituted, which, it contends, had no application whatever to motor carriers. It is true, of course, that the only provisions of part I of the act then applicable to carriers subject to regulation under part II were made so by specific reference in the latter part of the act. It is clear, however, that what is implied in the quoted portion of the notice of hearing is the question of relations between the two companies. The section of part I to which reference is made appropriately describes relations between motor-carrier corporations engaged in common-carrier and contract-carrier service between the same points or in the same territory, which would properly be subject to inquiry under section 210 of the act, relative to dual operation. The order does not require applicant to do anything under an inapplicable provision of part I. For the purpose of the inquiry the language in section 213 (b) (1) of the act as it then read might just as readily have been employed, which, except that it related to motor instead of rail carriers, contained the same language as section 5 (6) of part I, prior to an amendment of part II on June 28, 1938. Prior to such amendment the paragraph referred to provided that:

> It shall be unlawful for any person, except as provided in paragraph (a), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more motor carriers which are not also carriers by railroad, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effec-

tuated after the enactment of this part and in violation of this paragraph. As used in this paragraph, the words 'control or management' shall be construed to include the power to exercise control or management.

"The amendment added, after the phrase, 'carriers by railroad' in line 6, the following language, 'or of one or more such motor carriers and one or more carriers other than motor carriers.'" (R. 25, 26, Ex. 1, R. 85.)

It will be noted that after admitting that the section of Part I referred to in the notice was not applicable to appellant that appellee indicates that another law, section 213 (b) (1) of Part II, "might just as readily been employed." But a mere casual reading of this second statute shows that it applies only to common control and management effectuated after the passage of the Motor Carrier Act.

The amendment of Section 213 (b) (1) of Part II on June 28, 1938 and the repeal of said section and the incorporation of its provisions in Section 5 of Part I on September 18, 1940 had no effect whatever on the proposition that the section refers solely and exclusively to common control and management effectuated after the passage of the Motor Carrier Act of 1935.

In the court below and in the order complained of in what appears to be a discussion of 49 Stat. 554, the original Sec. 210 of the Motor Carrier Act of 1935, the appellee has contended that Section 210 of Part II of the Interstate Commerce Act as enacted September 18, 1940, 54 Stat. 919, 923 did not change the provisions or meaning of 49 Stat. 554, the original Section 210 of the Motor Carrier Act of 1935. In the order complained of in 28 M. C. C. at page 698 the appellee said:

"Individuals or single corporations which instituted both common-carrier and contract-carrier operations prior to the enactment of part II are not exempt from the provisions of section 210 even though the rights claimed are based on the 'grandfather' clauses of the act. See M. Moran Transp. Lines, Inc., Common Carrier Application 23 M. C. C. 139, 149. It certainly could not have been the intent of Congress to exempt from the operation of the section the individuals who were engaged in both types of operation, prior to the act, through the media of separate corporations.

"We therefore conclude that the section applies where two affiliated corporations, under common control and management, claim both common-carrier and contract-carrier operations between the same points or in the same territory." ((R. 32, Ex. 1, R. 85.)

It will be noted that the appellee attempts to discuss what was "the intent of Congress" in connection with the passage of 49 Stat. 554, the original Section 210 of the Motor Carrier Act of 1935. The legislative history of 54 Stat. 919, 923, section 210 of Part II of the Interstate Commerce Act, clearly discloses that the appellee has erroneously construed 49 Stat. 554, the original section 210 of the Motor Carrier Act of 1935 by attempting to apply it to separate persons under common control and management. The true intent of Congress in enacting Section 210 of Part II of the Interstate Commerce Act on September 18, 1940, 54 Stat. 919, 923, was to extend the provisions of said section for the first time to persons under common control, as is disclosed in the report of the Conference Committee prepared for the purpose of explaining the intent of the legislation and submitted to members of both the House and Senate before the law was passed.

Report No. 2832 of the House of Representatives of the Third Session of the 76th Congress was a conference report dealing with the Transportation Act of 1940. At Volume 86, Part 9 Congressional Record page 10169, said report explains the amendment in Section 21 (a) of Senate Bill 2009 which was the Transportation Act, as follows:

"SECTION 21 (a). DUAL OPERATIONS UNDER CERTIFICATES AND PERMITS, MOTOR CARRIERS.

"The conference substitute in section 21 (a) amends section 210 of the Interstate Commerce Act which prohibits a person from holding at the same time both a certificate as a common carrier of property by motor vehicle and a permit as a contract carrier of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that both forms of operating authority may be held consistent with the public interest and with the policy declared in part II, so that the section will apply not only to a particular motor carrier but also to any person controlling, controlled by, or under common control with, such person."

The conference report was agreed to by the House of Representatives at Volume 86, Part 9, Congressional Record, page 10194, and by the United States Senate at Volume 86, Part 11, Congressional Record, page 11766.

From the language of 54 Stat. 919, 923, Section 210, enacted September 18, 1940, and from the language of the conference committee report of Congress, it is very apparent that the holding of a certificate and permit by separate corporations under common management and control effectuated prior to the passage of the Motor Carrier Act of 1935 was not prohibited by statute prior to September 18, 1940.

The court below dismissed the cause for want of equity, and thereby affirmed the validity of order No. MC 2511 of the appellee approved May 29, 1941 (R. 66), and in so doing erred and deprived appellant of due process of law in:

(a) Sustaining the appellee in the exercise of a power not conferred on it by law,

(b) Sustaining the appellee in making an ex post facto application of 54 Stat. 919, 923, Section 210 of Part II of the Interstate Commerce Act enacted September 18, 1940, to a record completed two years before the enactment of the statute, and

(c) Sustaining the appellee in depriving appellant of rights acquired under 49 Stat. 552, Section 209a of the Motor Carrier Act of 1935, quoted in full in appendix B to this brief, without proper notice and an opportunity to be heard.

(a) An act or an order of an administrative body, though couched in a form which superficially considered might appear to be the exercise of authority conferred on it, should be set aside by the courts if it is based on an assumption of power not conferred by law.

In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 52 Sup. Ct. Rep. 146, 55 L. Ed. 283, this Court in 1911, speaking through Chief Justice White, at 55 L. Ed., pages 286 and 287, said:

> "In other words, the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority,

but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that, both in form and in substance, the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be stopped in the future from being entitled to receive a just and reasonable compensation for the service rendered. On the other hand, the Commission, in the argument at bar, does not contend that it possessed the indeed abnormal and extraordinary power which the railroads thus say were exerted in rendering the order complained of,—a power which, if it obtained, would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibility which ownership would imply. While it is not denied on behalf of the Commission that that body may have considered the prior rate prevailing in the Willia-

mette valley, the period during which it had been in force, and e effect upon the business situation in the valley of a change to a higher charge, all these things, it is insisted, were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one.

"It is clear, therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is: What was the nature and character of the order made by the Commission? That is: What, in substance, was the power which the Commission exerted in making the order?

"Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

In *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249, 29 Sup. Ct. Rep. 62, 53 L. Ed. 168, the Secretary of the Interior, charged with handling of Indian lands, struck without notice the name of an Indian from the rolls of those entitled to hold land, thereby assuming an arbitrary power which was not conferred upon him by law, and the court held that the right to be heard before property is taken or rights and privileges withdrawn which have been previously legally awarded is the essence of due process of law.

On June 23, 1938, the Commission issued its notice setting Cause No. MC 2511 for public hearing and requir-

ing appellant to establish its corporate relationship with Ziffrin Truck Lines, Inc., a common carrier, under a section of Part I of the Interstate Commerce Act (R. 43, Ex. 1, R. 85), which was not applicable and when there was no section of the Motor Carrier Act authorizing the Commission to examine into the corporate relationship of separate corporations which had not effectuated or proposed to effectuate a consolidation or other corporate relationship since the effective date of the Motor Carrier Act. Both of the above actions by the Interstate Commerce Commission assumed power in the Commission which was not conferred upon it by law, and were denials of due process of law to appellant.

(b) A statute comes within the constitutional prohibition of ex post facto law, which by its necessary operation and in relation to the offense, or its consequences, alters the situation of the accused to his disadvantage, and the application of a statute may be ex post facto as to offenses already consummated although the statute is lawful as to future offenses.

In *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, decided in 1798, the Supreme Court of the United States, speaking through Justice Paterson, said at 1 L. Ed., page 652:

> "The words, ex post facto, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains and penalties. Judge Blackstone's description of the terms is clear and accurate. There is, says he, a still more unreasonable method than this, which is called making laws ex post facto, when after an action, indifferent in itself, is committed, the Legislator, then for the first time, declares it to have been a crime, and inflicts a punishment upon the person who committed it. Here it is impossible, that the party could foresee that an action, innocent when it was done, should be afterward converted to

guilt by a subsequent law; he had therefore, no cause to abstain from it; and all punishment for not abstaining, must of consequence, be cruel and unjust."

In *Lindsey v. Washington,* 301 U. S. 397, 57 Sup. Ct. 797, 81 L. Ed. 1182, considering a change in indeterminate sentences and paroles after the commission of the offense but before sentence, the Supreme Court of the United States in 1937, speaking through Mr. Justice Stone, at 81 L. Ed. 1186, said:

> "But the ex post facto clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. King v. Missouri, supra (107 U. S. 228, 229, 27 L. Ed. 508, 509, 2 S. Ct. 443); Re Medley, 134 U. S. 160, 171, 33 L. Ed. 835, 840, 10 S. Ct. 384; Thompson v. Utah, 170 U. S. 343, 351, 42 L. Ed. 1061, 1066, 18 S. Ct. 620."

In *Thompson v. Utah,* 170 U. S. 343, 18 Sup. Ct. Rep. 620, 42 L. Ed. 1061, the United States Supreme Court considered a grand larceny committed while Utah was a territory, requiring twelve jurors, the accused was tried and convicted by eight jurors after Utah became a state. This Court in 1898, speaking through Mr. Justice Harlan at 42 L. Ed., page 1068, said:

> "If one under trial for a felony, the punishment of which is confinement in a penitentiary, could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt.
>
> "In our opinion the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by jury of

eight persons, is ex post facto in its application to felonies committed before the territory became a state, because in respect to such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

Section 210 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 310), effective September 18, 1940, for the first time made it unlawful for separate corporations under common management or control to hold a certificate and a permit, and that statute became effective after the hearing had been held, the record made, briefs filed, oral arguments held, and this cause submitted to the appellee for decision. There is nothing in the record before the appellee in this cause in any way reflecting conditions subsequent to the effective date of said Section 210, as amended September 18, 1940, and opportunity has been denied to appellant to show the Commission what it has done or what it is willing to do to comply with that statute. (R. 44, Ex. 1, R. 85.)

The effect of the Commission's order of May 29, 1941, was to penalize appellant to the full value of its property under a statute effective September 18, 1940, for a corporate relationship effectuated prior to the enactment of the Motor Carrier Act of 1935, and lawful when effectuated and lawful until September 18, 1940, without giving appellant any opportunity to comply with the new statute or to make any showings under it.

The actions of the Commission in denying appellant's petition filed June 25, 1941, for reconsideration and rehearing (R. 44, Ex. 1, R. 85) and deciding the cause under a statute not in effect during the period covered by

the record, were arbitrary, were of ex post facto application, and a denial of due process of law to appellant.

In this connection we desire to point out that the statute effective September 18, 1940, (R. 28, Ex. 1, R. 85) does not prohibit the appellee from granting certificates or permits, but simply prohibits corporations under common management or control from holding both a certificate and a permit unless the Commission finds that such holding is consistent with the public interest. It would seem under the circumstances of this case as was suggested by Commissioner Lee in his dissenting opinion to the appellee's order 28 M. C. C. 699, (R. 34, Ex. 1, R. 85) that the reasonable and equitable procedure would have been for the appellee to grant a permit having a scope as to territory and commodities conforming to the evidence in the record, but to make the issuance of the permit effective upon the appellant, showing to the appellee that it had complied with the provisions of the statute effective September 18, 1940.

(c) Parties whose rights are to be affected are entitled to be heard, and one who has acquired rights by an administrative proceeding can not be deprived of them without notice and an opportunity to be heard, and it is no answer for failure to give proper notice to assert that due process of law would have led to the same result as there was no adequate defense on the merits.

In *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531, decided January 18, 1864, the United States Supreme Court, speaking through Justice Clifford, at 17 L. Ed., page 534, said:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person

or property without notice and an opportunity to make his defense."

In *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 Sup. Ct. 206, 83 L. Ed. 126, decided December 5, 1938, the Supreme Court of the United States, speaking through Chief Justice Hughes, said at 83 L. Ed., page 142:

> "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. Russell v. Clark, 7 Cranch, 69, 96, 3 L. Ed. 271, 280; Mallow v. Hinde, 12 Wheat 193, 198, 6 L. Ed. 599, 600; Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 46 L. Ed. 499, 515, 22 S. Ct. 308; Garzot v. Rios de Rubio, 209 U. S. 283, 297, 52 L. Ed. 794, 800, 28 S. Ct. 548; General Invest. Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261, 285, 67 L. Ed. 244, 258, 43 S. Ct. 106. The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. See Mallow v. Hinde, 12 Wheat 193, 6 L. Ed. 593 supra."

In *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249, 29 Sup. Ct. R. 62, 53 L. Ed. 168, in a case in which the Secretary of the Interior struck without notice the name of an Indian from the rolls of those entitled to hold land, the Supreme Court of the United States, speaking through Justice Day, at 53 L. Ed., pages 174 and 175, said:

> "In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the Acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment inter-

ferring with the Secretary when he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

"In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

"The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

In *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 Sup. Ct. Rep. 625, 59 L. Ed. 1027, decided May 3, 1915, the Supreme Court of the United States, speaking through Justice Pitney, at 59 L. Ed., page 1032, said:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense in the merits. Rees v. Watertown, 19 Wall 107, 123, 22 L. Ed. 72, 77.

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for due process of law that the Constitution requires."

The appellant, prior to June 4, 1938, had complied fully with all applicable sections of the Motor Carrier Act of 1935 and with a compliance order issued by the Interstate Commerce Commission on May 12, 1938, and with the terms under the agreement entered into between the appellant and a District Supervisor of the Interstate Commerce Commission (R. 144, 145, Ex. 3, R. 85), and under Section 209 (a) of the Motor Carrier Act of 1935, quoted in the appendix to this brief, was entitled to a permit without further proceedings.

On June 4, 1938, the appellee issued an order which vacated the compliance order of March 12, 1938 (R. 42, Ex. 1, R. 85), without any notice or opportunity to appellant to be heard. This was a denial of due process of law in that it was the arbitrary exercise of a power by the appellee which was not conferred upon it by the statute. Said order of June 4, 1938, adversely affected the property and rights of appellant which had fully complied with all applicable statutory provisions and had restricted its operations to those authorized by the agreement with the District Supervisor and by said compliance order. (R. 144, 145, Ex. 3, R. 85.)

The order of the appellee dated June 23, 1938, setting Cause No. MC 2511 for public hearing, contained a notice that applicant must establish the corporate relationship existing between it and Ziffrin Truck Lines, Inc., a common carrier, which received no notice whatever of said proceeding, and that if they are found to be affiliated within the meaning of Section 5 (6) of Part I of the Motor Carrier Act of 1935, then applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Section 202 (a) of the Act within the meaning of Section 210 of said Act. (R. 43, Ex. 1, R. 85.)

Said notice was misleading and fatally defective for the reason that said Section 5 (6) of Part I of said Act was not applicable to motor carriers and at that time there was no statute which prohibited the holding of a certificate and a permit by separate corporations under a common control effectuated prior to 1935. At the hearing of the cause, however, under the defective notice and over the objection of appellant it was required to submit the proof upon which said order of May 29, 1941, the order complained of in this cause was based. The action of said appellee in issuing the defective notice assumed a power not conferred upon it by law, and the Acts of said appellee in requiring appellant over its objection to proceed under the defective notice and in denying completely all rights of the appellant on the basis of evidence taken under those conditions were all arbitrary acts and a denial of due process of law to the appellant.

The Commission order of May 29, 1941, admits that the provision of Part I quoted in the notice was not applicable (28 M. C. C. 693) (R. 25, 26, Ex. 1, R. 85), but says that Section 213 (b) (1) as it then read might just as readily have been employed. However, said Section 213 (b) (1), quoted at 28 M. C. C. 693, (R. 26, Ex. 1, R. 85) applies only to consolidations of motor carriers effectuated or proposed subsequent to the passage of the act, and no such consolidation at any time was proposed between appellant and Ziffrin Truck Lines, Inc., and that statute was not applicable. Even if it could be so construed under the decision of Coe v. Armour Fertilizer Works, quoted above, it is no answer in a due process case to say that a proper notice would have led to the same result. The notice issued and the proceedings had under the defective notice in their entirety were a denial of due process of law to the appellant.

2. The second assigned error is that the United States District Court for the Southern District of Indiana erred in determining and ruling and in stating as its conclusions of law and as the basis of its judgment herein the following:

a. That the law is with the defendants;

b. That there is substantial evidence to support the order of the defendant Interstate Commerce Commission; and

c. That the complaint should be dismissed for want of equity.

We have already covered (a) That the law is with the defendants, and (c) that the complaint should be dismissed for want of equity, by a discussion of the law applicable in that portion of our argument devoted to the first assigned error, and further discussion of these two propositions will not be made here.

(b) The ruling of the court below that there is substantial evidence to support the order of the defendant Interstate Commerce Commission is erroneous for the reason that said order of the Interstate Commerce Commission is based:

(1) In part on findings made without evidence,

(2) In part upon findings made upon evidence which clearly does not support them,

(3) In part upon findings predicated upon the rejection of uncontroverted evidence, and

(4) In part on a record in another cause before appellee which was not made a part of the record in this cause.

All of these arbitrary acts are a denial of due process of law to appellant.

(1) The appellee in its discussion supporting its finding that the holding of a permit by appellant and a certificate by Ziffrin Truck Lines, Inc., would not be consistent with the public interest, in 28 M. C. C. at 698 states:

> "The discrimination which the section is intended to obviate is always present when the same persons are able to offer both kinds of service in respect to the same commodities and between the same points." (R. 32, Ex. 1, R. 85.)

There is no evidence in the record showing that any kind of discrimination had been practiced by appellant or Ziffrin Truck Lines, Inc., in connection with their operations as motor carriers in interstate commerce. Furthermore, and particularly, there was no evidence in the record in this cause showing that "the discrimination which the section intended to obviate" was present in this case or that such discrimination "is always present."

The finding of appellee at 28 M. C. C., page 699, (R. 33, 34, Ex. 1, R. 85) that the holding of a permit by appellant and a certificate by Ziffrin Truck Lines, Inc., would not be consistent with the public interest is based upon the above assumption by the appellee of circumstances which might occur and not upon any evidence whatsoever in the record of any act of discrimination having occurred.

(2) The appellee in 28 M. C. C. at 694, in discussing the evidence in the record relating to the stock ownership of appellant states:

> "Another individual, also a director, who owns 49% of the stock, lives in the State of New York and has not attended a meeting of applicant's Board

of Directors for over two years." (R. 27, Ex. 1, R. 85.)

The quoted statement is absolutely erroneous. The stock ownership of appellant at the time of the hearing before appellee September 12 and 13, 1938, was clearly and definitely shown in the record before the appellee to be:

Sam Ziffrin, Indianapolis, Indiana	495 shares
S. O. Berman, Logansport, Indiana..	390 shares
L. Berger, Averne, New York	100 shares
Rose Levy, (Sister of Mr. Ziffrin)	15 shares
Total	1,000 shares

(R. 258, 297, 298, Ex. 3, R. 85)

"Another individual" referred to by the appellee is Mr. L. Berger of Averne, New York, who, instead of owning 49% of the stock of appellant at the time of hearing, owned 10% of the stock of the appellant at the time of hearing. (R. 297, Ex. 3, R. 85.)

It will be noted that the appellee stated that Mr. Berger owned 39% more of the stock of appellant than he actually owned at the time of the hearing, said 39% of the stock, being the 390 shares owned at the time of hearing by Mr. S. O. Berman of Logansport, Indiana, a director of appellant. The evidence showed that Mr. Berman had attended a meeting of the Board of Directors of appellant the day before said hearing began before the appellee. (R. 298, Ex. 3, R. 85.)

This absolutely erroneous statement of important evidence in this case was called to the attention of the appellee by the appellant in its petition for reconsideration and rehearing of the order complained of but the appellee denied said petition and has made no change whatsoever in its order to reflect the true and uncontroverted evidence in the record relating to the stock ownership of appellant at the time of the hearing on September 12 and 13, 1938. (R. 44, Ex. 1, R. 85.)

At the oral argument before appellee on October 27, 1939, appellant called attention to the fact that Mr. Berman of Logansport, Indiana, had died after the date of the hearing before appellee on September 12 and 13, 1938. In denying appellant's petition for rehearing, the appellee has denied appellant an opportunity to show by evidence the present owners of the stock previously held by Mr. Berman. (R. 433, Ex. 3, R. 85.)

(3) In making findings at 28 M. C. C. 699 (R. 33, Ex. 1, (R. 85) relative to the territory in which appellant was operating on July 1, 1935, and continuously since, and as to the commodities which appellant has been transporting in interstate and foreign commerce on July 1, 1935, and continuously since, the appellee rejected uncontroverted evidence in the record.

The appellee rejected the uncontroverted testimony of Mr. B. M. Angell, Indianapolis, Indiana, general traffic manager of Stokely Brothers and Company and Van Camps, Incorporated, as to the territory in which appellant had transported canned fruits and vegetables for said companies on, before and continuously since July 1, 1935. (R. 243-247, Ex. 3, R. 85.) The testimony of Mr. Angell relative to this transportation has been digested under III, Statement of the Case, at pages 17-19 of this brief.

This evidence is that applicant since prior to July 1, 1935, has transported canned fruits and vegetables for the companies represented by Mr. Angell throughout the territory included in appellant's application before appellee, as amended, and particularly to all points and places of 5,000 population and more in said territory. (R. 244, Ex. 3, R. 85.)

In spite of this testimony which was uncontradicted, the appellee in 28 M. C. C. at 699 (R. 33, Ex. 1, R. 85) in its finding relative to the transportation which appellant was performing on July 1, 1935, and continuously since, finds that appellant had transported canned and preserved food products from Indianapolis as the only point of origin to Cincinnati, Ohio, and Chicago, Illinois, as the only points of destination. (R. 33, Ex. 1, R. 85.) In making this finding, the appellee rejected the uncontradicted sworn testimony of Mr. Angell. (R. 243-247, Ex. 3, R. 85.) The integrity of his companies which are nationally known and the integrity of the witness are unquestioned.

In connection with the transportation of alcoholic liquors, the appellant, at the hearing before the appellee, submitted the testimony of representatives of most of the large distilleries in the United States. (R. 151, 175, 192, Ex. 3, R. 85.) In this connection it should be noted that the appellant began the transportation of alcoholic liquors at the specific request of a group of large liquor producers because of chaotic conditions existing in connection with the transportation of alcoholic liquors following repeal of the 18th Amendment. (R. 148, 149, Ex. 3, R. 85.)

The appellee rejected the uncontroverted testimony of Mr. Frank H. Luther, general traffic manager of Joseph E. Seagram and Sons, and many allied and affiliated companies as to the territory in which appellant had trans-

ported alcoholic liquors for said companies on, before and continuously since July 1, 1935. (R. 175, 192, Ex. 3, R. 85.) The testimony of Mr. Luther relative to this transportation has been digested under III, Statement of the Case, at pages 19-20 of this brief.

This evidence is that appellant since prior to July 1, 1935, has transported alcoholic liquors for the companies represented by Mr. Luther throughout the territory included in appellant's application before appellee, as amended. (R. 177, Ex. 3, R. 85.) The only reservation in the testimony of Mr. Luther as to the service of appellant throughout the territory involved was as to the States of Ohio and Pennsylvania, (R. 176, Ex. 3, R. 85) where by reason of a state monopoly of the sale of alcoholic liquors, the destinations served by appellant on, before and continuously since July 1, 1935, were specific points in those states which were named by Mr. Luther and set out in the digest of his testimony at pages 19-20 of this brief.

The appellee rejected the uncontroverted testimony of Mr. Edward Guskey, general traffic manager of Schenley Distilleries, Incorporated, and many allied and affiliated companies as to the territory in which appellant had transported alcoholic liquors and distillers' supplies for said companies on, before and continuously since July 1, 1935. (R. 196, 197, Ex. 3, R. 85.) The testimony of Mr. Guskey relative to this transportation has been digested under III, Statement of the Case, at pages 20-21-22 of this brief.

This evidence is that appellant since prior to July 1, 1935, has transported alcoholic liquors and distillers' supplies for the companies represented by Mr. Guskey throughout the territory included in appellant's applica-

tion before appellee, as amended. (R. 196, 197, Ex. 3, R. 85.) The only reservation in the testimony of Mr. Guskey as to the service of appellant throughout the territory involved was as to the States of Ohio and Pennsylvania (R. 200, Ex. 3, R. 85), where by reason of a state monopoly of the sale of alcoholic liquors, the destinations served by appellant on, before and continuously since July 1, 1935, were specific points in those states which were named by Mr. Guskey (R. 362, Ex. 3, R. 85) and set out in the digest of his testimony at page 20 of this brief.

In restricting appellant to the territory and commodities set out in its finding, 28 M. C. C. 699, (R. 33, Ex. 1, R. 85) the appellee rejected the uncontroverted evidence of shipper witnesses concerning transportation service which appellant had performed in interstate commerce on, before and continuously since July 1, 1935. The rejection of this uncontroverted evidence by appellee was an arbitrary act and a denial of due process of law to appellant.

(4) The appellee, as indicated by its discussion in the order complained of, 28 M. C. C. 694, (R. 27, Ex. 1, R. 85) has based its findings in part upon a record made and evidence taken in its docket No. MC 2510 which was the Ziffrin Truck Lines, Inc., Common Carrier Application, 6 M. C. C. 722. (R. 27, Ex. 1, R. 85.) The appellant was not a party to the proceedings in MC 2510 and had no opportunity to cross-examine the witnesses in that proceeding, but the appellee in the order complained of, 28 M. C. C. at 694, states:

> "In the report and order dealing with the application of the common-carrier company, to which appropriate reference has been made in the record in this proceeding, it was found that the president thereof was also president of the applicant herein

> and that certain of the vehicles used in the service of both the common-carrier company and applicant herein bore the names of both carriers, and were registered in the names of both companies. At least one of the drivers who testified in that proceeding was unable to state definitely which company employed him in or about the statutory date, and one other driver had occasionally hauled for the applicant herein and had considered the president of the two concerns as his employer." (R. 27, Ex. 1, R. 85.)

At the hearing of appellant's application on September 12 and 13, 1938, the examiner representing the appellee and conducting the hearing for appellee, stated at page 264 of the record before the appellee (R. 306, Ex. 3, R. 85) that "I would say that in view of the issue raised by the orders that all due and proper consideration will be given to the proceeding in M. C. 2510." This is the "appropriate reference" mentioned in the order complained of at 28 M. C. C. 694 (R. 27, Ex. 1, R. 85). It is obvious and apparent from the discussion contained in the order of appellee which is quoted that the appellee did give consideration to the record in M. C. 2510 in deciding appellant's case, without introducing that record in evidence or giving appellant any opportunity to cross examine the witnesses who testified in that case, a case of which appellant had no notice and in which appellant did not participate.

An order based upon findings made without evidence or upon evidence which clearly does not support them, or upon rejection of uncontroverted evidence or upon evidence not in the record is an arbitrary act and a denial of due process of law.

In *Northern Pacific Railway Company v. Department of Public Works* (1925), 268 U. S. 38, 45, 69 L. Ed. 836, the United States Supreme Court, speaking through Justice Brandeis, said at 69 L. Ed. 841:

> "The mere admission by an administrative tribunal of *matter* which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, or mere error in reasoning upon evidence introduced, does not invalidate an order. • • • An order based upon a finding made without evidence (Chicago Junction Case (Baltimore and O. R. Co. v. United States), 264 U. S. 258, 263, 68 L. Ed. 667, 673, 44 Sup. Ct. Rep. 317), or upon a finding made upon evidence which clearly does not support it (Interstate Commerce Commission v. U. P. R. Co., 222 U. S. 541, 547, 56 L. Ed. 308, 311, 32 Sup. Ct. Rep. 108) is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process."

In the Chicago Junction case (1924) *Baltimore & O. R. Co. v. United States*, 264 U. S. 258, 44 Sup. Ct. Rep. 317, 68 L. Ed. 667 at page 674, the Supreme Court of the United States, speaking through Justice Brandeis, said:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."

In *Railroad Commission v. Pacific Gas & Electric Co.* (1938), 302 U. S. 388, 58 Sup. Ct. Rep. 334, 82 L. Ed. 319, at page 322, the Supreme Court of the United States, speaking through Chief Justice Hughes, said:

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. Ohio Bell Teleph. Co. v. Public Utilities Commission, 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57

S. Ct. 724. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily."

In 1913, the United States Supreme Court, speaking through Justice Lamar in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 33 Sup. Ct. Rep. 135, 57 L. Ed. 431, said at 57 L. Ed. 433:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depend on facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercise of power."

The rejection of uncontroverted evidence as a denial of due process of law was discussed by the United States Supreme Court in the case of *Ohio Utilities Co. v. Public Utilities Commission*, 267 U. S. 359, 69 L. Ed. 657. In that case decided in 1925, in an opinion by Justice Sutherland, the rejection of certain uncontroverted evidence as to value by the Ohio Public Utilities Commission and the affirmance of its order by the State Supreme Court was held to be a denial of the due process to which the utility was entitled. At 69 L. Ed. page 659, the court used the following language:

"There was no testimony to the contrary; and the company, in view of the concession, evidently deemed it unnecessary to produce evidence upon the point. That such expenditures in a substantial amount would necessarily be made in reproducing the utility is clear; it is not suggested that the estimate of the engineers is excessive or unfairly made; and the rejection of the entire amount cannot be regarded as otherwise than arbitrary. * * * The Commission found, it is true, that the plant had been inefficiently operated. But we find no evidence to this effect in the record, and none has been called to our attention. To the contrary, the commission's engineer, who examined the property and accounts of the company, testified that he considered the expenditures of the company were reasonable, and that the plant was efficiently and economically managed. * * * From the foregoing, it is evident that the state supreme court did not accord to the plaintiff in error that sort of judicial inquiry to which, under the decisions of this court, it was entitled."

The Examiner of the appellee stated during the hearing in Cause MC 2511 that all due and proper consideration would be given in MC 2511 to the proceeding in MC 2510 which was Ziffrin Truck Lines, Inc., Common Carrier Application. (R. 306, Ex. 3, R. 85.) The record in MC 2510 was not in evidence in Cause No. MC 2511, but is discussed and made the basis of a part of appellee's findings in the case at bar. Such a decision based on evidential facts not spread of record is a denial of due process of law, as was clearly held by the United States Supreme Court in 1937 in an opinion by Justice Cardozo, in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 57 Sup. Ct. Rep. 724, 81 L. Ed. 1093. In that case, in which trends in value were taken from trade magazines not in evidence, the court said at 81 L. Ed. 1099:

"Upon the strength of these unknown documents, refunds have been ordered for sums amounting into millions. This is not the fair hearing essential to due process. It is condemnation without trial."

The record before the appellee shows that appellant renders a specialized service which can not be rendered by a common carrier, such as Ziffrin Truck Lines, Inc. (R. 265, Ex. 3, R. 85.) It serves only those with whom it has contracts, maintains an efficient police and guard system, and can in emergencies throw its entire fleet into the service of one contracting party to meet its needs. (R. 264, 265, Ex. 3, R. 85.) The interchange of vehicles between these corporations and in fact with other carriers, also tends to the efficient and economic operation of the carriers, reduces the number of trucks on the highways, and is beneficial rather than harmful to the interest of the public. (R. 327, Ex. 3, R. 85.)

There is nothing in the record to show that either appellant, the contract carrier, or Ziffrin Truck Lines, Inc., the common carrier, have in any way received any advantage over any competitor by reason of their being under common control, and the finding of the appellee that a permit could not be held by appellant consistently with the public interest and the National Transportation Policy is not sustained by any substantial evidence in the record, is contrary to the uncontroverted facts in the record, is arbitrary, and a denial of due process of law.

3. The third assigned error is that the United States District Court for the Southern District of Indiana erred in applying Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940 (54 Stat. 919, 923, U. S. Code, Title 49, Sec. 310), to both a record made and facts existing prior to that date by determining and finding and stating as its special finding of fact No. VIII

(Appendix A of this brief), and as one of the bases of its judgment herein that under said Section 210 as to the relationship between Ziffrin Truck Lines, Inc., the common carrier, and plaintiff, the record showed certain relationships.

This proposition has been fully discussed in that portion of our argument in connection with the application of Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940, 54 Stat. 919, 923 U. S. Code, Title 49, Section 310, by the appellee. Appellant points out, however, that the court below made the same error in connection with its special finding of fact No. VIII (Appendix A of this brief) as that which was made by the appellee in applying section 210 of Part II of the Interstate Commerce Act enacted September 18, 1940, to both a record made and facts existing on a date more than two years prior to the enactment of said Section 210 of Part II of the Interstate Commerce Act, and in finding certain relationships as existing between appellant and Ziffrin Truck Lines, Inc., the common carrier, under the provisions of said section.

4. The fourth assigned error is that the United States District Court for the Southern District of Indiana erred in determining and finding and stating as its special finding of fact No. IX and as one of the bases of its judgment herein that there was sufficient substantial evidence presented to the appellee to sustain its conclusion and order which include findings that:

(a) The holding of a permit by the plaintiff authorizing contract carrier operations would not be consistent with the public interest and with the national transportation policy;

(b) That Ziffrin, Incorporated, plaintiff, was not en-

titled to operating rights as to territory and commodities as stated in its application to the Interstate Commerce Commission, as amended.

(a) The proposition that the Commission erred in finding that the holding of a permit by appellant would not be consistent with the public interest and the national transportation policy has been discussed in our argument in connection with the second assigned error and will not be repeated here. The court below erred in the same particulars as the appellee in that it affirmed the validity of the order of the appellee containing the erroneous findings heretofore discussed.

(b) In connection with our argument under the second assigned error and included in our discussion of the conclusions of law of the court below that there is substantial evidence to support the order of the appellee, we pointed out how the appellee rejected uncontroverted evidence concerning operating rights both as to territory and commodities to which appellant is entitled under the law.

It would appear at first blush that any discussion of the erroneous findings of the appellee relative to appellant's operating rights amounts to a discussion of a moot question in view of appellee's other finding that no permit should be issued to appellant because of alleged conflict with the provisions of Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940, (28 M. C. C. 699) (R. 33, 34, Ex. 1, R. 85). However, when viewed in the light of appellee's rejection of uncontroverted evidence indicating that appellant is entitled to greater operating rights both as to commodities and territory than those included in the order complained of, it becomes apparent that there may have been an intent on the part of ap-

pellee to restrict the finding relative to appellant's operating rights to the territory for which appellee had already issued a certificate to Ziffrin Truck Lines, Inc., the common carrier in Cause No. MC 2510. The obvious reason for such restriction of the finding relative to the operating rights of appellant is found in the language of Section 210 of the Interstate Commerce Act, effective September 18, 1940, which has been set out in full at 28 M. C. C. 695, (R. 28, Ex. 1, R. 85).

In order to apply said section to appellant, not only was it necessary to find that appellant and Ziffrin Truck Lines, Inc., the common carrier, are under common control and management, but also it was necessary to find that appellant and Ziffrin Truck Lines, Inc., operate "over the same route or within the same territory."

An examination of the authority granted Ziffrin Truck Lines, Inc., by the appellee in 6 M. C. C. 722 will disclose that it is almost identical with the operating territory which appellee found appellant was entitled to in the order complained of. The evidence of record is that the appellant, while operating over irregular routes, reaches most of the points covered by the regular route operations granted by appellee to Ziffrin Truck Lines, Inc. But the uncontroverted evidence of record, which was rejected by appellee, is that appellant also operates and was operating on July 1, 1935, in a territory vastly exceeding that in which the common carrier company Ziffrin Truck Lines, Inc., was authorized to operate by appellee.

In the order complained of, 28 M. C. C. 698, the appellee, in comparing the operating authority to which appellee finds appellant is entitled, with the operating authority which appellee had already granted to Ziffrin

Truck Lines, Inc., the common carrier, makes the following statement:

> "Only two points, Aurora and South Bend, which are not included in the authority granted the common carrier company, are included in the operations which the record shows applicant has been engaged in continuously as a contract carrier." (R. 33, Ex. 1, R. 85.)

The authority granted Ziffrin Truck Lines, Inc., by appellee for the State of Ohio is restricted principally to Cincinnati, Ohio, and a few other points near the Indiana-Ohio State Line, 6 M. C. C. 736, 737. (R. 34, 35, Ex. 1, R. 85.) But the uncontradicted evidence of record as to appellant which was rejected by appellee shows that appellant operated to all points and places in the State of Ohio. (R. 243, 244, Ex. 3, R. 85.) The certificate granted Ziffrin Truck Lines, Inc., by appellee includes no right to operate anywhere in or anywhere near the State of Pennsylvania, 6 M. C. C. 736, 737, (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that appellant operates and was operating on July 1, 1935, to Pittsburgh, Pennsylvania, Schenley, Pennsylvania, and other points and places in the State of Pennsylvania in that area. (R. 176, 197, 200, Ex. 3, R. 85.)

The certificate granted Ziffrin Truck Lines, Inc., by the appellee includes Peoria and Chicago, Illinois, and some points near the Chicago area, 6 M. C. C. 736, 737 (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that the appellant operates and was operating on July 1, 1935, to points and places throughout the State of Illinois. (R. 243, 244, 361, 362, Ex. 3, R. 85.)

The certificate granted Ziffrin Truck Lines, Inc., by the appellee grants authority to serve Louisville, Kentucky, and the border cities of Newport and Covington, Ken-

tucky, near Cincinnati, Ohio, 6 M. C. C. 736, 737 (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that appellant is operating and was operating on July 1, 1935, to all points and places within a radius of 150 miles of Louisville, Kentucky. (R. 243, 244, Ex. 3, R. 85.)

The certificate granted to Ziffrin Truck Lines, Inc., by appellee does not include any authority to serve St. Louis, Missouri, 6 M. C. C. 736, 737 (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that appellant has served St. Louis, Missouri, on, before and continuously since July 1, 1935. (R. 362, 194, 197, Ex. 3, R. 85.)

The certificate granted Ziffrin Truck Lines, Inc., includes no authority to serve any point in the State of Wisconsin, 6 M. C. C. 736, 737 (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that appellant has served Milwaukee, Wisconsin, and points intermediate between Milwaukee, Wisconsin, and Chicago, Illinois, in the State of Wisconsin on, before and continuously since July 1, 1935. (R. 176, 177, Ex. 3, R. 85.)

In United States of America and Interstate Commerce Commission v. Carolina Freight Carriers Corporation, 62 Sup. Ct. Rep. 722, 86 L. Ed. 627, this court in an opinion delivered by Mr. Justice Douglas, sustains the power of the Interstate Commerce Commission to place restrictions on the geographic scope of the truck operations of an applicant under the "grandfather" clause of the Motor Carrier Act of 1935, but indicated clearly that the exercise of this restrictive power must be based upon the evidence before the Commission. The opinion points out that in some instances the "ability to render the service throughout the wide regions of the territory which the applicant professed to be willing to serve may not have

existed," but in the case at bar not only did the record before the appellee show ability on the part of the appellant to render service throughout the territory involved, but there was the uncontradicted evidence of responsible shippers that the service had actually been performed on, before and continuously since July 1, 1935.

In further discussing the power of the Commission to restrict the geographic scope of truck operations, the court made it clear that the Commission has no right to restrict the territory for reasons other than lack of substantial evidence.

In this connection the opinion says:

> "This does not mean that the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be in existence if the authority is granted."

In the case at bar, appellant has contended that the appellee in its findings restricted the territorial rights of appellant under the "grandfather" clause, not because of lack of substantial evidence to support appellant's claimed territory, but in order to make the finding of appellant's operating rights fit the territory of the certificate which the appellee had already granted to Ziffrin Truck Lines, Inc., the common carrier company.

CONCLUSION

The appellant concludes that the court below erred in sustaining the order of the appellee, Interstate Commerce Commission denying appellant a permit to which it is lawfully entitled under the provisions of the "grandfather" clause of the Motor Carrier Act of 1935, 49 Stat. 552, and thereby totally destroying appellant's business

of a value of more than $500,000.00, and which has been in continuous existence since 1933.

The appellant further concludes that the first finding in the subject order of the Interstate Commerce Commission, the finding which limits the scope of appellant's proposed operating rights as to territory and commodities, is the result of the rejection of uncontroverted evidence and that this finding and the judgment of the court below which sustained the finding, deny due process of law to appellant and are contrary to law.

The appellant further concludes that the appellee, Interstate Commerce Commission in its order MC 2511 approved May 29, 1941, and the court below in sustaining that order erroneously applied Section 210 of Part II of the Interstate Commerce Act, effective September 18, 1940, to a record made September 12 and 13, 1938, when the applicable section was Section 210 of the Motor Carrier Act of 1935, and that if the facts of record are to be viewed in the light of the then applicable statute, there was no prohibition in the law against the granting of a permit to appellant. If Section 210 of Part II of the Interstate Commerce Act, effective September 18, 1940, is to be applied, then appellant has been denied its day in court, and has not been afforded its lawful opportunity of submitting evidence as to the relation between appellant and the common carrier company subsequent to the passage of Section 210 of Part II of the Interstate Commerce Act, effective September 18, 1940.

The appellant further concludes that the appellee, Interstate Commerce Commission, in its order MC 2511, approved May 29, 1941, and the court below, in sustaining that order, erred in finding that the holding of a permit by appellant would not be consistent with the public in-

terest and with the national transportation policy, and that such finding of the appellee is based upon assumptions and not upon evidential facts in the record.

It is appellant's further conclusion that appellant should have an opportunity to submit evidence to the appellee under the provisions of the law as it now exists, to show appellant's full compliance therewith, which appellant is ready, able and willing to do if opportunity be afforded it. The appellant believes that irrespective of which statute is found to be applicable, that it has been denied due process of law, and that this cause should be reversed and remanded to the court below for further proceedings appropriate to the order of this court.

Respectfully submitted,

IRA HOWELL ELLIS,
JOHN S. POWELL,
Counsel for Ziffrin, Incorporated,
Appellant.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ZIFFRIN, INCORPORATED,
a Corporation, et al.,
Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, et al.,
Defendants.

Civil Action
No. 448

SPECIAL FINDINGS OF FACT

Pursuant to Rule 52 of the Rules of Civil Procedure, the court now states its Special Findings of Fact, as follows:

I

That, on February 4, 1936, the plaintiff, Ziffrin, Incorporated, of Indianapolis, Indiana, filed an application with the Interstate Commerce Commission pursuant to section 209 (a) of the Motor Carrier Act, 1935, for a permit authorizing the continuance of operations as a contract carrier by motor vehicle in interstate commerce or foreign commerce of general commodities from certain designated points in Indiana to points and places in Indiana, Ohio, Kentucky, Illinois, western Iowa, southeastern Wisconsin, West Virginia, to Buffalo, New York, Pittsburgh, Pennsylvania, and St. Louis, Missouri, over irregular routes.

II

That this application was referred to a field representative of the Commission to investigate the nature and extent of plaintiff's operations, and as a result of his report

the Commission, on March 5, 1938, issued a so-called compliance order authorizing plaintiff to engage in contract carrier transportation by motor vehicle according to specifications set forth therein. This order provided for the filing of protest within thirty days of this entry; such protest was duly filed; the compliance order was vacated pursuant to its terms; and the application was set down for formal hearing before an examiner.

III

That the protest referred to above called the Commission's attention particularly to the relationship of plaintiff to Ziffrin Truck Lines, Inc., a common carrier, disclosed by Commission's Docket No. M. C. 2510, and alleged that issuance of a permit to plaintiff would violate Section 210 of the Motor Carrier Act.

IV

That, accordingly, the notice of hearing on plaintiff's application stated that inquiry would be made into the relationship between plaintiff and Ziffrin Truck Lines, Inc., in the light of the provisions of Section 210 of the Motor Carrier Act, 1935. Reference was made to Section 5 (6) of Part I of the Interstate Commerce Act as then constituted, for the purpose of indicating that the scope of the inquiry would include the question as to control or management in a common interest of the plaintiff and Ziffrin Truck Lines, Inc.

V

That, in due course, plaintiff's application was referred to an examiner. Evidence was fully developed by plaintiff and other parties to the proceeding on the issues raised by the application, the protest and the notice of hearing.

VI

That, after an unfavorable report by the examiner, the case was reviewed by Division 5 of the Commission on plaintiff's exceptions to the examiner's report and on oral argument. On May 29, 1941, the Division issued a report finding that plaintiff was in operation on July 1, 1935, and continuously since that time as a contract carrier of certain commodities between specified points and destinations. A permit was denied, however, because it was found that plaintiff and Ziffrin Truck Lines, Inc., the common carrier, were owned, controlled and managed in a common interest, and that under Section 210 of the Act the holding of a permit by the plaintiff, authorizing contract carrier operations, would not be consistent with the public interest and with the national transportation policy. Plaintiff's application for reconsideration was denied by the full Commission on September 29, 1941.

VII

That the complaint in this case was filed on October 21, 1941, and answers were duly filed on behalf of the United States and the Interstate Commerce Commission. Argument was had and the case submitted on final hearing on January 17, 1942. At the hearing plaintiff introduced in evidence a certified copy of the record before the Interstate Commerce Commission, and certain additional evidence designed to show the extent of the damage to plaintiff from the operation of the Commission's order.

VIII

That on the issue under Section 210 as to the relationship between Ziffrin Truck Lines, Inc., the common carrier, and plaintiff, the record before the Commission

showed that Sam Ziffrin was the president and general manager of both concerns. At the time of the hearing the board of directors, the officers and the sole stockholders of the plaintiff corporation were Sam Ziffrin, Mrs. R. Levi, S. O. Berman, and Lewis Berger. Mrs. Levi is Sam Ziffrin's sister. Apparently she took some part in the corporate affairs; Ziffrin testified that she attended directors' meetings regularly. Ziffrin testified that Berger had not attended a directors' meeting in over two years, and Berman had attended only one meeting during the year preceding the hearing. The stock of plaintiff corporation consisted of 1,000 shares. Sam Ziffrin owned 495 shares, and his sister, Mrs. Levi, owned 15 shares. Mr. Berman owned 390 shares and Mr. Berger 100 shares. In the common carrier company, Sam Ziffrin owned 98 per cent of the stock, and the remaining 2 per cent was owned by members of his family. The officers, directors and stockholders of that concern were Sam Ziffrin, Esther Ziffrin, his wife, and David and Lewis Ziffrin, his sons. Mrs. Ziffrin was also assistant treasurer of the plaintiff corporation. Other evidence of close relation between the two companies is to be found in the joint use of equipment and employees, which the record plainly disclosed. Sam Ziffrin represented both the common and contract carriers in their dealings with shippers.

IX

That there was sufficient substantial evidence presented to the Commission to sustain its conclusion and order.

Sherman Minton
Judge, United States Circuit Court of Appeals.

Robert C. Baltzell
Judge, United States District Court.

John P. Barnes
Judge, United States District Court.

Dated this 4th day of June, 1942.

CONCLUSIONS OF LAW

Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows, to-wit:

I

That the law is with the defendants; that there is substantial evidence to support the order of the defendant, Interstate Commerce Commission, and that the complaint should be dismissed for want of equity.

II

That the defendants should recover of and from the plaintiff their costs herein, taxed at $.....

Sherman Minton
Judge, United States Circuit Court of Appeals.

Robert C. Baltzell
Judge, United States District Court.

John P. Barnes
Judge, United States District Court.

Dated this 4th day of June, 1942.

DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

No. 448 Civil

ZIFFRIN, INCORPORATED, a Corporation,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION

Before the Honorables, Sherman Minton, U. S. Circuit Judge, and Robert C. Baltzell and John P. Barnes, District Judges.

Come now the parties by their respective attorneys and the Court having heard the evidence and argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

Upon the foregoing special findings of fact and conclusions of law, it is,

ORDERED, ADJUDGED AND DECREED:

1. That this cause be and the same is hereby dismissed for want of equity.

2. That the defendants recover of and from the plaintiff their costs, herein taxed at $———.

(Signed)

Sherman Minton,
Judge, United States Circuit Court of Appeals.

Robert C. Baltzell,
Judge, United States District Court.

John P. Barnes,
Judge, United States District Court.

APPENDIX "B"

Section 209 of the Motor Carrier Act of 1935, August 9, 1935, 49 Stat. 552, U. S. Code, Sup. 1, Title 49, Section 309.

(a) No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business: Provided, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions

of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: Provided further, That nothing in this part shall be construed to repeal, amend or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the policy declared in section 202 (a) of this part; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and

from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

APPENDIX "C"

Section 5 (6) of Part I of the Interstate Commerce Act, 49 Stat. 218.

(6) It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (7), the words "control or management" shall be construed to include the power to exercise control or management.

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No. 245

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

ZIFFRIN, INCORPORATED,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Appellees.

APPELLANT'S REPLY BRIEF

IRA HOWELL ELLIS,
JOHN S. POWELL,
520 Illinois Building,
Indianapolis, Indiana,
Counsel for Ziffrin, Incorporated, Appellant.

Central Publishing Company, Indianapolis, Ind.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 245

ZIFFRIN, INCORPORATED,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,

Appellees.

APPELLANT'S REPLY BRIEF

In replying to the brief of the appellees, Interstate Commerce Commission and the United States of America, appellant will first address itself to the propositions contained in appellees' brief in the order in which they appear therein, and later will call attention to certain propositions included in appellant's brief but which are not discussed in appellees' brief.

OPINION BELOW

The statements in appellees' brief and appellant's brief in reference to this matter are substantially the same and no further discussion is required in this reply brief.

JURISDICTION

The statements in appellees' brief and appellant's brief relative to the jurisdiction of this court are substantially the same and no further discussion is required in this reply brief.

QUESTIONS PRESENTED

The questions presented by appellees' brief are discussed by appellees in their argument, and appellant will direct its attention to these questions as they arise in the argument of appellees. However, there are other questions in the case in addition to the three propositions presented in appellees' brief under this caption, and said questions were fully and completely presented in appellant's brief. The appellees have not discussed certain questions in this case which were discussed in appellant's brief. Some questions and the reference to where they are discussed in appellant's brief are as follows:

The ruling of the court below that there is substantial evidence to support the order of the defendant Interstate Commerce Commission is erroneous for the reason that said order of the Interstate Commerce Commission is based:

(1) In part on findings made without evidence,

(2) In part upon findings made upon evidence which clearly does not support them,

(3) In part upon findings predicated upon the rejection of uncontroverted evidence, and

(4) In part on a record in another cause before appellee Commission which was not a part of the record in this cause.

These propositions are discussed at pages 49 to 60 inclusive of appellant's brief and the following cases are there cited in support of appellant's position regarding the evidence:

Baltimore & O. R. Co. v. United States, 264 U. S. 258, 44 Sup. Ct. Rep. 317, 68 L. Ed. 667;

Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88, 33 Sup. Ct. Rep. 135, 57 L. Ed. 431;

Northern Pacific Railway Company v. Department of Public Works, 268 U. S. 35, 69 L. Ed. 836;

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 Sup. Ct. Rep. 724, 81 L. Ed. 1093;

Ohio Utilities Co. v. Public Utilities Commission, 267 U. S. 359, 69 L. Ed. 657;

Railroad Commission v. Pacific Gas & Electric Co., 302 U. S. 388, 58 Sup. Ct. Rep. 334, 82 L. Ed. 319.

STATUTES INVOLVED

The appellees cite certain of the statutes involved in this case, but by reason of the action of the appellee, Interstate Commerce Commission, certain other statutes are involved. These statutes are:

Section 5 (6) of Part I of the Interstate Commerce Act, 49 Stat. 218, which is reproduced as Appendix A of this brief, Section 213 (b) (1) of the Motor Carrier Act of 1935, 49 Stat. 555, which is reproduced as Appendix B of this brief, and Section 222 of the Motor Carrier Act of 1935, 49 Stat. 564, which is reproduced as Appendix C of this brief.

STATEMENT

The appellant in its brief submitted a detailed statement of the case. The appellees in their brief include a statement of the case to which some reply appears necessary by reason of statements not supported by the record references contained therein.

At page 3 of appellees' brief, in referring to the original proceedings had on appellant's application before a district supervisor of the appellee, Interstate Commerce Commission, appellees' brief refers to the result of these proceedings as a "report" of a field representative of the Commission which was followed by the issuance of the compliance order of March 12, 1938. As a matter of fact this compliance order which authorized the issuance of a permit to appellant on certain conditions, was not the result of any report by a field representative of the appellee, but the result of a signed agreement by and between appellant and a district supervisor of the appellee, Interstate Commerce Commission, who was acting as its agent. (R. 36, 37, 38, Ex. 1, R. 85.)

Thereafter, in the statement, the appellees refer to the provisions of the compliance order providing for protests thereof, and in a footnote on page 4 of appellees' brief reference is made to a decision of the United States District Court for the Western District of Missouri in Hoerman v. United States discussing such compliance orders. While perhaps properly coming under argument, the appellees, nevertheless, presented this matter in their statement of the case. It appears that they have missed entirely the point raised by the appellant.

We have never contended that the appellee, Interstate Commerce Commission, did not have the power to set aside said compliance order upon proper proceedings being had,

but we have and do contend that the appellee, Interstate Commerce Commission, had no right to vacate said compliance order without first giving notice and hearing to appellant. (See Garfield v. United States, ex rel. Goldsby, 211 U. S. 249, 29 Sup. Ct. Rep. 62, 53 L. Ed. 168.)

Immediately after the reference to the Missouri District Court decision, appellees' brief, at page 4, states:

> "Protests were filed and requests for a formal hearing were received by the Commission, all of which were served upon the appellant. See R. 15. 110."

As a matter of fact, the record does not show that these protests were served upon the appellant or that appellant had any notice whatsoever that such protests were filed. Appellant had no notice of these protests until after said compliance order had been vacated and set aside.

At the close of the hearing of appellant's application on September 13, 1938, appellant called to the attention of the appellee, Interstate Commerce Commission, on the record that these protests contain certain allegations stating in the event the compliance order was set aside and a hearing held on appellant's application that protestants would establish by competent evidence that appellant was not in bona fide operation as a contract carrier on July 1, 1935, and appellant further called to the attention of the appellee, Interstate Commerce Commission on the record that the parties filing these protests who appeared and participated in the hearing of September 12 and 13, 1938, submitted no evidence whatsoever in support of the allegations of their protests. (R. 356, Ex. 3, R. 85.)

Furthermore, the examiner of the appellee admitted this to be a fact and stated that it would be given due consideration by the appellee, Interstate Commerce Commission. (R. 356, Ex. 3, R. 85.)

At pages 7 and 8 of appellees' brief in connection with their statement of the case, appellees assert that the appellee, Interstate Commerce Commission, has determined that the corporate separation between appellant and Ziffrin Truck Lines, Inc., was insufficient to obviate the provisions of Section 210 of Part II of the Interstate Commerce Act as enacted September 18, 1940. The record shows that no "corporate separation" had ever occurred, nor was any corporate separation necessary because appellant and Ziffrin Truck Lines, Inc., are and have been since the dates of their respective organizations, before the Motor Carrier Act of 1935 was enacted, separate and distinct corporations. (R. 363-378, Ex. 3, R. 85.)

The record further shows that appellant and Ziffrin Truck Lines, Inc., have been recognized as separate corporations by the States of Indiana and Ohio. (R. 261, 262, Ex. 3, R. 85.) The record further shows that various divisions of the appellee, United States of America, had recognized appellant and Ziffrin Truck Lines, Inc., as separate and distinct corporations. (R. 256, 258, Ex. 3, R. 85.)

The record shows that the appellee, Interstate Commerce Commission had recognized appellant and Ziffrin Truck Lines, Inc., as separate and distinct corporations in that their applications filed pursuant to the provisions of the "grandfather" clause of the Motor Carrier Act of 1935 were heard and determined separately and without any consolidation thereof whatsoever, and on widely separated dates. (R. p. 132, Ex. 3, R. 85, 6 M. C. C. 722.)

SUMMARY OF ARGUMENT

I

A. The appellee, Interstate Commerce Commission, applied amended Section 210 of Part II of the Interstate

Commerce Act without giving appellant an opportunity to be heard and to show that it had complied with the amended Section 210 after its passage. That appellant should be given this opportunity was raised by Commissioner Lee in his opinion concurring in part in the order of appellee Commission which is complained of in this cause.

The reference and discussion by appellee of 33 M. C. C. 155, Ziffrin Truck Lines, Inc., Contract Carrier Application is improper, is not in the record, and appellees had by their answers admitted that appellant had exhausted its remedies before appellee, Interstate Commerce Commission. Cases cited by appellees are no authority for the action taken by the Commission in this cause.

B. Original Section 210 of the Motor Carrier Act of 1935 did not prohibit the holding of a permit by appellant. The Motor Carrier Act of 1935 is a penal statute and should be strictly construed and should not be extended to other offenses than those clearly prescribed and provided for. Conference report No. 2832, 76th Congress, 3rd Session, says original Section 210 was amended, which means changed, and the congressional construction of original Section 210 is contrary to the construction placed on it by appellees.

The New York & New Brunswick Auto Express Co., Inc., Common Carrier Application, 23 M. C. C. 663, cited by the appellees, at pages 676 and 677, outlines the procedure which appellant believes should have been followed by appellee Commission in giving appellant its day in court. The decision of the Commission and the judgment of the court below denying appellant its day in court should be corrected.

II

Appellant freely admits common control of appellant and Ziffrin Truck Lines, Inc., from 1934 to September 18, 1940, but contends that such control does not now exist.

III

The Commission's finding that a permit could not be held by appellant consistently with the public interest is not based on evidence in the record, but upon the Commission's assumptions in its order and on the proposition that its decision can not be reviewed under the doctrine of administrative finality. This case is reviewable even under the doctrine of administrative finality.

The appellant concludes that the decree of the district court should be reversed and the cause remanded to the court below for proceedings appropriate to the order of this court.

ARGUMENT

I

The appellees state their proposition as being that "the Commission rightly concluded that to grant a permit to appellant would violate Section 210 of the Interstate Commerce Act," and thereunder as a subdivision thereof, the following is stated:

> "A. The Commission is bound to apply Section 210 as it existed at the time of its decision."

In making the statement that the Commission in making an order is required to apply the law as it exists at the time of the decision, the appellees state a proposition with which appellant has no quarrel, but we do earnestly contend that the appellee, Interstate Commerce Commission, had no right to decide the case and apply Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940, to a record made September 12 and 13, 1938, to appellant's brief dated November 22, 1938, and to appellant's oral argument made October 27, 1939, all of which occurred before the law applied to appellant was enacted by Congress, without giving appellant an opportunity to be heard, to present evidence and to show whether or not it had complied with said law after the enactment thereof.

At page 13 of appellees' brief in footnote 7, the statement is made that appellant did not "raise this ground for voiding the Commission's denial of its application until this case was instituted in the district court," and the further assertion is made that in the petition for reconsideration, reargument and rehearing filed by appellant before appellee that no request was made to show compliance with Section 210. The fact that the question was raised before

the Commission is indicated in the opinion of Commissioner Lee, Chairman of Division 5 of the appellee, concurring in part in the decision of the Commission:

> "I agree with the report except for the second finding which is based upon the conclusion that we are without authority to grant the permit because of the dual operations. Under similar facts in New York & New Brunswick Auto Exp. Co., Inc., Com Car. App., 23 M. C. C. 663, we granted a certificate to a common carrier corporation and a permit to a contract carrier corporation on condition that within 90 days they would make a satisfactory showing that they were no longer under any common control in any degree whatever. There is no reason for not allowing applicant the same sort of privilege in this case as an alternative to denial of the application. Unless there is absolutely no other means of solving the problem, it would not seem necessary to wipe out this contract carrier business." (R. 34, Ex. 1, R. 85.)

Appellant respectfully submits that the appellees cannot contend that the question of giving appellant an opportunity to comply with Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940, was not before the Commission in connection with appellant's petition for reconsideration, reargument and rehearing when the Chairman of the division of the appellee to which appellant's application was originally referred, specifically calls attention to the matter in the language just quoted.

Also in appellees' brief at page 13, there is reference to an order of the appellee, *Interstate Commerce Commission*, 33 M. C. C. 155, and certain circumstances purported to be connected therewith, none of which is anywhere in the record in this case, and we respectfully submit that no consideration whatsoever should be given by this court to matters discussed by appellees which are outside the record.

Reference to *Ziffrin, Incorporated Contract Carrier Application*, 33 M. C. C. 155 will show that the appellee, Interstate Commerce Commission, a second time denied appellant the right to submit evidence as to its compliance with Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940. We respectfully submit that the appellees are bound by their pleadings filed in this case.

In paragraph 34 of appellant's complaint in this action, it was alleged that appellant had exhausted its remedies before the appellee, Interstate Commerce Commission. (R. 11, Exhibit 1, R. 85.) The appellee, Interstate Commerce Commission filed its answer to appellant's complaint in the court below, and admitted the allegations of said paragraph 34 of said complaint that appellant had exhausted its remedies before the appellee, Interstate Commerce Commission. (R. 50.) The appellee, United States of America also filed its answer to appellant's complaint in the court below and admitted the allegations of said paragraph 34 that appellant had exhausted its remedies before the appellee, Interstate Commerce Commission. (R. 52.)

We do not believe that the appellees can properly submit to this court, as an attempt at justification of their denial of due process of law to appellant, what occurred in 33 M. C. C. 155 in an effort to settle and compromise this lawsuit at the suggestion of the judges of the court below, all of which matters are not in evidence or of record in this proceeding before this court.

In a footnote on page 14 of their brief, appellees make some discussion of appellant's proposition that Section 210 of the Motor Carrier Act of 1935 prior to its amendment as Section 210 of the Interstate Commerce Act on September 18, 1940, gave the appellee, Interstate Com-

merce Commission, no authority to consider whether or not there was common control between two separate corporations such as appellant and Ziffrin Truck Lines, Inc. In that connection appellees' brief states:

> "Assuming that the Commission had no authority to consider whether there was a common control between the two corporations under Section 210 before its amendment, the Commission in its notice of hearing to appellant nevertheless gave appellant ample notice that such issues would be considered."

This statement falls of its own weight. If it be assumed, as was the fact, that the Commission had no authority to consider the question of common control between two separate corporations such as appellant and Ziffrin Truck Lines, Inc., under Section 210 before its amendment, then it becomes apparent the Commission, in giving notice that it proposed to consider such issues, exceeded its powers, and there was no lawful obligation or duty upon appellant to submit any evidence or to make any adjustments of its control when any determination concerning the matter was beyond the power of the appellee, Interstate Commerce Commission.

In said footnote the appellees quote the notice and order of hearing with which appellant was required to comply, which notice included a statement that the appellee proposed to use Section 5 (6) of Part I of the Interstate Commerce Act in determining appellant's situation in connection with Section 210 of the Motor Carrier Act of 1935. Said Section 5 (6) of Part I of the Interstate Commerce Act at that time was applicable only to rail carriers and had no application whatever to appellant.

In appellees' brief, in discussing this matter, they state that appellant's objection to Section 5 (6) "is not clear." The objection was made by appellant in the record before

appellee at the time of the hearing on September 12 and 13, 1938, (R. 250, 251, 252, Exhibit 3, R. 85), and has been repeatedly made by appellant at every opportunity since that time. The objection is that appellee in using non-applicable law in determining appellant's application, exceeded the power conferred upon it by law, and deprived appellant of due process of law.

The appellees, in the footnote on page 14 referred to, state that the reference in said notice by appellee to said non-applicable Section 5 (6) of Part I of the Interstate Commerce Act was "merely included to show the scope of the issues." We respectfully submit that this situation had nothing to do with the issues, and that the lawful issues at that time were determined by Section 210 of the Motor Carrier Act of 1935 as it then read.

In attempting to justify the action of the appellee, Interstate Commerce Commission in applying Section 210 of Part II of the Interstate Commerce Act enacted September 18, 1940, to a record made, to briefs filed and argument had two years prior to the enactment of said new Section 210 which completely changed the law, and for the first time made the question of the common control of appellant and Ziffrin Truck Lines, Inc., a pertinent issue, the appellees, in their brief, refer to certain decisions of this court.

At page 15 of appellees' brief, as an introduction to a consideration of these decisions, the appellees state:

> "It is a fundamental principle applicable to civil cases that where a law is amended subsequent to a decision therein by a lower court but prior to the disposition of the case involving such law on appeal, the appellate court is bound to apply the amended law to the case."

It is true that in certain cases where a law has been amended subsequent to a decision by a lower court and

while an appeal is pending before an appellate court that the amended law has been applied, but never under circumstances comparable to the action taken by the appellee, Interstate Commerce Commission, in the case at bar.

One of the cases cited by appellees in an attempt to justify the action of the appellee, Interstate Commerce Commission, is *Dinsmore v. Southern Express Co.*, 183 U. S. 115, 120. That case involved a requirement of a war revenue act of 1898 requiring the express company to affix certain revenue stamps to bills of lading.

While the case was on appeal before the Supreme Court of the United States, the law was changed to relieve express companies from affixing the revenue stamps to bills of lading, and the court dismissed the case as involving a moot question since the matter in controversy had been removed by amendment of the law.

The other cases cited in connection with the proposition involving cases on appeal are to the same effect. These cases have no application to the case at bar because there has been no change in the law since the appeal to this court. The change in the law was made at the time when the matter was pending before the appellee, Interstate Commerce Commission, and the appellee proceeded to apply the new law to a record made and facts existing two years prior to the enactment of the new law without giving appellant any opportunity to submit evidence showing its situation under the provisions of the new law.

The appellees also state, however, that the proposition stated in connection with cases on appeal also applies to a trial court where there is an amendment to law subsequent to the institution of a suit, but before a court's decision thereof, and cite in support of this statement *Duplex Printing Press Co. v. Deering*, 254 U. S. 443.

In discussing this case, the appellees at page 16 of their brief state:

> "* * * where the action of a trial court in applying provisions of the Clayton Act to a Sherman Act suit instituted prior to the passage of the Clayton Act was sustained."

But the appellees failed to state that although the provisions of the Clayton Act were passed after the filing of the suit, that said act was also passed two years before the trial of the suit in the lower court and that all parties to the suit agreed that the law was applicable and all parties were given an opportunity to submit argument, to submit evidence, to file briefs, and to make arguments on the law which was applied to them.

In this case decided in 1921, in an opinion by Mr. Justice Pitney, at 65 L. Ed. 354, the court states:

> "Both parties invoke the provisions of the latter act (Clayton Act) and both courts treated them as applicable,"

and at 65 L. Ed. 355, the court says:

> "That Act (Clayton Act) was passed after the beginning of the suit but more than two years before it was brought to hearing."

The decision in the Duplex case only serves to emphasize the equity of what appellant is contending for in this case. That is, the right for a hearing and the right to submit evidence under the law which is applicable to it.

In this connection we want to point out again a matter which was stated in appellant's brief and to which no reference whatever has been made in appellees' brief, and that is, not only did the appellee, Interstate Commerce Commission apply Section 210 of Part II of the Interstate

until September 18, 1940, when Section 210 of said act was amended, that appellant and Ziffrin Truck Lines, Inc., were separate and distinct corporations under common management and control, but appellant contends that it has since complied with Section 210 as amended September 18, 1940, and will, if afforded an opportunity, present evidence to the appellee Commission to show that no such common management and control now exist.

III

At page 28 of appellees' brief it is stated: "The Commission properly determined that the dual operations of appellant and Ziffrin Truck Lines, Inc., would not be consistent with the public interest and the National Transportation Policy." Supporting this proposition, appellees point out that there were only two points which the Commission determined appellant had been serving which were not involved in the authority granted to Ziffrin Truck Lines., Inc., the common carrier.

The Commission did so find, but in so doing disregarded uncontroverted evidence of record, which proposition has been fully discussed in appellant's brief at pages 62 to 66, inclusive. Having found that the operations of the two companies were conducted over the same routes or within the same territory, the appellees state at page 30 of their brief that the evidence failed to show that the dual operation would be consistent with the public interest and the National Transportation Policy, and that on the contrary the evidence particularly demonstrated some of the vices inherent in the relationship of appellant to Ziffrin Truck Lines, Inc.

Appellees cite the record in the following pages: 188-190, 257, 301, 322 and 323. At pages 188-190 the record

shows that Mr. Luther (general traffic manager, Jos. E. Seagram & Sons and subsidiaries) knew he was dealing with Ziffrin, Incorporated, and that there was no confusion between the two companies so far as Mr. Luther was concerned.

At page 257 of the record Mr. Ziffrin testified that at certain terminals detail work was handled for both appellant and Ziffrin Truck Lines, Inc., by the same employees who also worked for other truck line common carriers.

At page 301 of the record, Mr. Ziffrin testified to substantially the same facts as to employees.

At pages 322 and 323 of the record, Mr. Ziffrin testified that a vehicle might take a load to Chicago for appellant and handle a return load for Ziffrin Truck Lines, Inc., or for any other companies that desired to avail themselves of the equipment. This interchange of vehicles between all carriers is, of course, now required by the ODT as economical operation for the benefit of the public, and certainly does not show any inherent vice in the relationship of appellant to Ziffrin Truck Lines, Inc.

With reference to whether the dual operation is consistent with the public interest, we respectfully direct the court's attention to pages 357 to 361 of the record, which were in evidence as part of Ex. 3, R. 85. This petition of the Kentucky Liquor Producers' Traffic Association certainly sets forth the need for the service, and its consistency with the public interest and the National Transportation Policy.

At pages 30 and 31 of appellees' brief, appellees set forth the underlying reasons for the enactment of Section 210 and say that they are obvious. The appellees cite a number of Commission cases, but do not point out wherein

in the record under consideration there was present any of the unfair competition which is, according to appellees, the obvious underlying reason for the enactment of Section 210. They do cite pages of the record, 16, 22, 27-29, 33 and 34, which are references to the order, finding and conclusion of the Commission, and state that the findings respecting public interest were an administrative determination resting peculiarly within the province of the Commission.

A number of cases are cited which set up the doctrine of administrative finality. The appellant is not unmindful that the doctrine of administrative finality has been expanded to great limits, but there are still some limitations even on that doctrine.

In *Rochester Telephone Corporation v. The United States*, 307 U. S. 125, which is probably the leading case on this doctrine, this court in 1939, in an opinion by Mr. Justice Frankfurter, after disposing of the question of judicial review of negative orders, said at 83 L. Ed. 1157, 1158:

> "The other is the doctrine of administrative finality, even when resorts to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions effecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

In this case, appellant has raised the constitutional question of denial of due process of law, the statutory authority under Section 210 of the Motor Carrier Act of 1935 in the Commission to examine into the corporate relationship of separate corporations under common management and control effectuated prior to the passage of

the Motor Carrier Act, and has charged that the Commission made findings without evidence, upon evidence that clearly does not support them, made findings predicated upon the rejection of uncontroverted evidence, and based their findings in part on a record in another cause before appellee Commission which was not a part of the record in this cause, and the judicial review of this cause is, therefore, within the narrow range of issues open to review as set forth in the Rochester Telephone case.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's original brief in this cause, it is respectfully submitted that the decree of the district court should be reversed and the cause remanded to the court below for proceedings appropriate to the order of this court.

IRA HOWELL ELLIS,
JOHN S. POWELL,
Counsel for Ziffrin, Incorporated, Appellant.

December 12, 1942.

APPENDIX "A"

SECTION 5 (6) OF PART I OF THE INTERSTATE COMMERCE ACT, 49 STAT. 218:

"(6) It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (7), the words "control or management" shall be construed to include the power to exercise control or management."

APPENDIX "B"

SECTION 213 (b) (1) OF THE MOTOR CARRIER ACT OF 1935, 49 STAT. 555:

"It shall be unlawful for any person, except as provided in paragraph (a), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more motor carriers which are not also carriers by railroad, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or

management accomplished or effectuated after the enactment of this part and in violation of this paragraph. As used in this paragraph, the words "control or management" shall be construed to include the power to exercise control or mangement."

APPENDIX "C"

SECTION 222 OF THE MOTOR CARRIER ACT OF 1935, 49 STAT. 564:

"Sec. 222. (Added August 9, 1935.) (U. S. Code, Sup. I; Title 49, Sec. 322.) (a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

(b) If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representa-

tive thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this part, or who by means of any false statement or representation or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this part for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this part provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

(d) Any special agent or examiner who divulges any fact or information which may come to his knowledge during the course of the examination of the accounts, records, and memoranda of motor carriers or brokers as provided in Section 220 (b), except as he may be directed by the Commission or by a court of competent jurisdiction, or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than $5,000 or imprisonment for a term not exceeding two years, or both.

(e) It shall be unlawful for any motor carrier or broker engaged in interstate or foreign commerce or any officer, receiver, trustee, lessee, agent, or employee of such carrier, broker, or person, or for any other person authorized by such carrier, broker, or person to receive informa-

tion, knowingly to disclose to, or permit to be acquired by any person other than the shipper or consignee without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee or routing of any property tendered or delivered to such motor carrier or broker for such transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

(f) Nothing in this part shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States or of any State, Territory, or District thereof, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier or broker, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers or brokers.

(g) Any motor carrier, or broker, or any officer, agent, employee, or representative thereof who shall willfully fail or refuse to make a report to the Commission as required by this part, or to keep accounts, records, and memoranda in the form and manner approved or prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file any false report, account, record, or memorandum, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not less than $100 and not more than $5,000."

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 245

ZIFFRIN, INCORPORATED, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The district court filed no opinion. Its findings of fact and conclusions of law (R. 62–66) are not officially reported. The report of the Interstate Commerce Commission (R. 13–35) appears in 28 M. C. C. 683.

JURISDICTION

The final decree of the district court was entered on June 4, 1942 (R. 66). The petition for appeal

was presented on June 10, 1942 (R. 68), and was allowed on the same day (R. 73). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (28 U. S. C. 45a, 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (28 U. S. C. 345); and by Section 205 (g) of the Interstate Commerce Act, Part II,[1] c. 498, 49 Stat. 543 (49 U. S. C. 305 (h)).

QUESTIONS PRESENTED

1. Whether, upon finding that appellant contract carrier corporation and a common carrier corporation (Ziffrin Truck Lines, Inc.) were owned, controlled and managed in a common interest, the Interstate Commerce Commission rightly concluded that to grant a permit to appellant would violate Section 210 of the Interstate Commerce Act.

2. Whether the finding of the Commission that appellant and Ziffrin Truck Lines, Inc., were owned, controlled and managed in a common interest i correct.

3. Whether the Commission properly determined that the dual operations of appellant and

[1] This statute was formerly entitled the Motor Carrier Act, 1935, but was retitled "part II of the Interstate Commerce Act" by Section 15 of the Act of September 18, 1940, c. 722, 54 Stat. 898 (the Transportation Act of 1940). It will be hereafter cited as the Interstate Commerce Act in accordance with Section 1 of the Transportation Act of 1940.

Ziffrin Truck Lines, Inc., would not be consistent with the public interest and the national transportation policy.

STATUTES INVOLVED

The relevant provisions of the Motor Carrier Act, 1935, the Transportation Act of 1940, and the Interstate Commerce Act, Part II, in effect on and before the date of the Commission's order of May 29, 1941, are reproduced in the Appendix, *infra,* pp. 33–39.

STATEMENT

Appellant motor carrier filed an application on February 4, 1936, with the Interstate Commerce Commission for a permit to continue designated contract carrier operations under the "grandfather" clause of Section 209 (a) of the Interstate Commerce Act (R. 94A, 14). Following the practice adopted for expediting the numerous applications pending before the Commission, the application was referred to a field representative to investigate the nature and extent of appellant's operations (see R. 40). Later, as a result of his report, the Commission issued a "compliance" order authorizing appellant to engage in certain contract carrier transportation. This order also provided "that if applicant or any other party in interest desires to protest the issuance of such permit, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order,* a petition setting

forth the grounds relied upon in opposing the granting of the said authority and requesting that the issuance of such permit be withheld pending further investigation and order by the Commission. Otherwise, such protests shall be denied." [2] (R. 38–39.) Protests were filed and requests for a formal hearing were received by the Commission, all of which were served upon the appellant (see R. 15, 110). These protests called particular attention to the relationship of appellant to Ziffrin Truck Lines, Inc., (Docket No. MC 2510), a common carrier by motor vehicle, and alleged that the issuance of the permit under the compliance order was in violation of Section 210 (before amendment by the Transportation Act of 1940) prohibiting dual operations. Following its usual

[2] As to the effect of a "compliance" order, the United States District Court for the Western District of Missouri said in *Hoerman* v. *United States*, District Court for Western District of Missouri, decided June 5, 1941, not reported:

> The whole force of Point I, however, depends upon the assumption that the Commission had once granted a certificate to plaintiff. But it had never done that. The Commission only had granted a conditional permit (called a "compliance" order), reserving jurisdiction ultimately to grant or deny the application. (There was such a multitude of applications under the "grandfather" clauses that no course was practical other than to grant temporary permits and defer final action.) Nothing in the act forbids such a reservation of jurisdiction.

See also *Ideal Motors, Inc., Contract Carrier Application*, 24 M. C. C. 187; *Merchants Parcel Delivery Co., Inc., Contract Carrier Application*, 21 M. C. C. 93, 94; *Charles Burnett Trucking Co., Inc., Common Carrier Application*, 10 M. C. C. 615, 616.

procedure, the Commission rescinded the compliance order and entered an order directing that appellant's application be set for formal hearing. Included in this order was notice that inquiry would be made into the relationship between appellant and Ziffrin Truck Lines, Inc. (R. 42–44.)

Hearing was had on September 12 and 13, 1938 (R. 132, 263), at which appellant's application was opposed by various motor and rail carriers (R. 111). Appellant introduced evidence in support of its claim of "grandfather" rights and evidence was also received respecting the relationship between appellant and Ziffrin Truck Lines, Inc., the common carrier company (R. 134–356).

Following this hearing, the examiner filed his proposed report and recommended order (R. 108) to which exceptions were filed by both appellant and protestants (see R. 7). Oral argument was had before Division 5 of the Commission (R. 422). On May 29, 1941, the Commission, Division 5, issued its report and order wherein it found that the granting of the permit sought would result in a violation of Section 210, as amended by the Transportation Act of 1940,[3] and, therefore,

[3] The Transportation Act of 1940 (c. 722, 54 Stat. 898) was approved on September 18, 1940. The oral argument before the Commission occurred on October 27, 1939, but the order of the Commission was not issued until May 29, 1941 (R. 422, 35–36). This delay was not untoward because 78,819 applications had been filed under the "grandfather" clause before Febtuary 12, 1936. 51st Annual Report of the Interstate Commerce Commission, p. 71 (1937).

denied the application (R. 13–14). Thereafter appellant filed a petition for reconsideration, reargument, and rehearing, which was denied by the full Commission on September 29, 1941 (R. 44).

The report of the Commission, Division 5, upon which the denial order was based, recited the history of appellant's operations and found that on July 1, 1935, they were those of a contract carrier for the transportation of the following: alcoholic liquors from Lawrenceburg and Louisville to Chicago, Cincinnati, Indianapolis, Gary, Fort Wayne, Terre Haute, and South Bend; returned shipments of alcoholic liquors, empty containers, labels, and other liquor-distillery supplies from Chicago, Cincinnati, Indianapolis, Gary, Fort Wayne, Terre Haute, and South Bend to Lawrenceburg and Louisville; oleomargarine from Indianapolis to Cincinnati and Peoria; canned and preserved food products from Indianapolis to Cincinnati and Chicago; meats and packing-house products from Chicago to Indianapolis; and waste paper board from Indianapolis to Chicago and Aurora (R. 24).

The report, after noting that Ziffrin Truck Lines, Inc., a common carrier company, had been granted a certificate as a common carrier of general commodities, with certain exceptions, to serve a territory encompassing all but two points (Aurora and Terre Haute) served by appellant, and that appellant's operations to these points

were necessarily conducted over the routes or within the territory served by the common carrier company, proceeded to a consideration of the relations between appellant and the common carrier company, that being one of the principal issues raised by the protests (R. 33). The report called attention to the similarity in the names of the two carriers and to the fact that their offices were in the same city. It then found that Sam Ziffrin was the common president of both companies; that he owned 98 percent of the stock of and managed the common carrier company; that he personally owned 49½ percent of appellant's stock and that, with his sister, he owned 50½ percent of its stock; that trucks were registered in the names of both the appellant and the common carrier company; that the same driver frequently operated a truck carrying shipments in one direction for appellant and, on the return trip, for the common carrier company; and that many of the vehicles displayed the names of both companies (R. 27). From these and other findings and upon consideration of the whole record, the Commission announced its ultimate finding that "applicant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle, are owned, controlled, and managed in a common interest" (R. 33–34).

Proceeding to the applicability of Section 210, as amended by the Transportation Act of 1940, the

Commission determined that the corporate separation was insufficient to obviate the prohibition of the statute since the grant of a permit to appellant would place in the hands of the same "person", as defined in Section 203,[4] authority to conduct operations both as a common and a contract carrier "in respect of the same commodities and between the same points" (R. 29–32). The continuance of such dual operation by appellant and the common carrier company was found not to be consistent with the public interest and the national transportation policy, as defined in Section 1 of the Act of September 18, 1940, c. 722, 54 Stat. 898 (Appendix, *infra*, pp. 33–34) (R. 34). Accordingly, the Commission denied appellant's application (R. 36).

Following this denial, appellant instituted a suit to annul and set aside the Commission's order. Hearing was held by a statutory court of three judges on January 17, 1942, at which time appellant introduced a certified copy of the testimony and exhibits before the Commission and also new and additional evidence[5] intended to show irreparable injury resulting from the Commission's order. This evidence is part of the record herein.

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[4] Sec. 203 (a) (1) (49 U. S. C. 303) provides that—

> The term "person" means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

[5] This evidence was received subject to the Government's objections (R. 86, 87).

On June 4, 1942, the court below filed its special findings of fact and conclusions of law and dismissed the proceedings for want of equity (R. 62–65). Specifically, the court below found that there was substantial evidence to support the findings, conclusion, and order of the Commission and "that the law is with the defendants" (R. 65).

SUMMARY OF ARGUMENT

I

Upon finding that appellant contract carrier corporation and Ziffrin Truck Lines, Inc., a common carrier corporation, were owned, controlled and managed in a common interest, the Interstate Commerce Commission was plainly forbidden to issue appellant a permit as a contract carrier because of Section 210 of the Interstate Commerce Act as it existed at the time of the Commission's decision. Before judgment, courts must apply to civil cases the effective amendments to applicable statutes; *a fortiori,* this rule must be applied to an administrative tribunal where its action operates *in futuro.* Since the "grandfather" clause (sec. 209) confers merely a special privilege, the application of this rule would not interfere retroactively with vested interests. There is a further absence of vested rights here for the "grandfather" privileges, not having been passed upon, remained inchoate.

In any event, the dual operations were prohibited by the original Section 210. The Commission so interpreted the statute in other cases and was justified in disregarding the corporate fiction here involved; otherwise, the policies of that section would be thwarted. Courts will not lightly upset a settled administrative construction, especially where, it is submitted, Congress in its amendment to Section 210 merely intended to ratify the Commission's construction.

II

Whether appellant and Ziffrin Truck Lines, Inc., were owned, controlled and managed in a common interest was a question of fact to be determined by the Commission. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146.

The finding of the Commission that the corporations were controlled in a common interest must be sustained since supported by substantial evidence. The record discloses that appellant and Ziffrin Truck Lines were outgrowths of the operations of Sam Ziffrin, an individual engaged in the trucking business prior to 1933. Although two corporations were formed, they were managed as a single enterprise by Mr. Ziffrin. Stock control in the two companies resided in Mr. Ziffrin, his wife and sister. They and other members of his family were employed in the operations of the

companies. Both companies had the same offices and terminals in Chicago and Indianapolis. In some instances, they used the same equipment and shared employees. Many of the trucks were registered in the names of both companies and both names were painted on them. These facts and others appearing of record afford a rational basis for the Commission's finding of common control and management.

III

The Commission properly determined that the dual operations as contract and common carriers of appellant and Ziffrin Truck Lines, Inc., which conducted operations "over the same route or within the same territory" (sec. 210), would not be consistent with the public interest and the policy of the Act, as required by Section 210. The Commission was prevented by this section from granting appellant a permit unless *"for good cause shown"* it should find that the dual operations would not contravene the public interest and national transportation policy. [Italics supplied.] Appellant failed to satisfy the statutory burden, and the evidence revealed the vices inherent in the relationship of the two corporations. The reasons for the enactment of Section 210 demonstrate that it was designed to prevent unfair competition between the two classes of motor carriers through solicitation of business and the opportunity to offer both kinds of service for the same

commodities between the same points. For these reasons, the determination of the Commission must be sustained.

ARGUMENT

I

THE COMMISSION RIGHTLY CONCLUDED THAT TO GRANT A PERMIT TO APPELLANT WOULD VIOLATE SECTION 210 OF THE INTERSTATE COMMERCE ACT

A. The Commission Was Bound To Apply Section 210 as It Existed at the Time of Its Decision

Section 210 of the Interstate Commerce Act (Appendix, *infra*, p. 38), as amended by the Transportation Act of 1940 (Appendix, *infra*, pp. 38–39), declares that "no person * * * shall hold a permit as a contract carrier * * * if * * * any * * * person under common control, holds a certificate as a common carrier." As previously indicated (n. 4, *supra*) the term "person," is specifically defined in the Act to include a corporation, and the issuance of permits under the "grandfather" clause of Section 209 is made specifically subject to the provisions of Section 210 (see Appendix, *infra*, p. 36). In the present case, the Commission concluded that appellant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle, were owned, controlled, and managed in a common interest (R. 33–34). Since appellant was thus clearly a person under common control with a person, Zif-

frin Truck Lines, Inc., which held a certificate as a common carrier,[6] the issuance of a permit to appellant was plainly forbidden by the express language of Section 210, as it was at the time of the Commission's decision.[7]

Appellant seeks, however, to avoid this obvious result by urging (Br. 41–43, 61) that Section 210, in the form adopted in the Transportation Act of 1940, cannot be applied to a situation such as the present one, where the record before the Commission's examiner was made prior to the passage of that Act, even though the decision of the Commission was issued thereafter (see Statement, p. 5, and n. 3, *supra*). It contends too (Br. 32–33) that, prior to its amendment by the Transportation Act of 1940, Section 210 would not have applied where

[6] Such a certificate was granted in *Ziffrin Truck Lines, Inc., Common Carrier Application*, 6 M. C. C. 722.

[7] Appellant claims (Br. 31) that it was denied the right to submit evidence as to its compliance with Section 210, as amended, and that it should have been given opportunity to submit evidence to the Commission under the law as it now exists. But appellant did not raise this ground for voiding the Commission's denial of its application until this case was instituted in the district court. In its petition to the Commission for reconsideration, reargument, and rehearing following final decision, appellant made no request to be allowed to show compliance with Section 210. And, while this case was pending in the district court, the Commission entertained a petition proposing a plan for the separation of the two companies. Its report denying this petition appears in *Ziffrin, Incorporated, Contract Carrier Application*, 33 M. C. C. 155.

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two separate corporations under common control were respectively engaged as common and contract carriers. But, assuming for the moment the correctness[8] of the latter proposition, it is clear that there is a basic error in appellant's

[8] Assuming that the Commission had no authority to consider whether there was common control between the two corporations under Section 210 before its amendment, the Commission in its notice of hearing to appellant nevertheless gave appellant ample notice that such issues would be considered. This notice read as follows (R. 43):

> Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc. (No. MC–2510) and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of Section 5 (6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act, 1935.

Thus, even if authority to inquire into the issue of common control can be considered as first having been actually granted under the amended Section 210, there is no ground for any contention that appellant was denied an opportunity to furnish proof on this issue.

Appellant objects (Br. 47–48) to this notice because of its reference to Section 5 (6) which applied only to railroads, although the exact nature of the objection is not clear. In any event this objection is frivolous, because, as both the Commission and the lower court recognized in their decisions (R. 25–26, 63) this reference was merely intended to show the scope of the issues and not as any indication that Section 5 (6) was actually to be applied to appellant.

first contention and that the Commission was instead bound to apply Section 210 in its amended form to appellant's case.

It is a fundamental principle applicable to civil cases that where a law is amended subsequent to a decision therein by a lower court but prior to the disposition of the case involving such law on appeal, the appellate court is bound to apply the amended law to the case. This proposition was recognized by this Court as early as 1801 in the case of *United States* v. *The Schooner Peggy,* 1 Cranch 103, 110. Speaking through Mr. Chief Justice Marshall the Court there declared:

> It is, in general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. * * * In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

See also *Dinsmore* v. *Southern Express Company &c.*, 183 U. S. 115, 120; *Gulf Col. & S. F. Ry.* v. *Dennis*, 224 U. S. 503; *Texas Co.* v. *Brown*, 258 U. S. 466, 474; *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 201; *Crozier* v. *Krupp*, 224 U. S. 290, 302. That this same proposition applies as well to a trial court, where there is an amendment of law subsequent to the institution of a suit but before the court's decision thereon, was made clear in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464, in which the action of a trial court in applying provisions of the Clayton Act to a Sherman Act suit instituted prior to the passage of the Clayton Act was sustained. The Court stressed the fact that injunctive relief operating *in futuro* was involved, but here the Commission in granting or denying appellant a permit was concerned entirely with the future. *A fortiori*, we submit that the same rule must be applied with respect to the Commission as an administrative tribunal, and that the Commission was required to apply the law as it existed at the time of decision in the absence of any express statutory mandate to the contrary.

There is in the Transportation Act of 1940 neither express nor implied mandate to the contrary. Certainly the reasons for forbidding dual operations as common and contract carriers by two corporations under common control were as compelling with respect to carriers on whose applications

testimony had been taken but decision not yet issued as in the case of those upon whose applications evidence had not yet been submitted. It is to be noted, also, that shortly before the passage of this legislation, the opinion in *United States* v. *Maher*, 307 U. S. 148, 155, indicated that rights under "grandfather" applications did not become fixed until the time when the Commission "passed upon the application." Since the Commission obviously does not "pass upon the application" until it renders its decision, Congress must have intended that the amended Section 210 was to be applied in all "grandfather" cases where the Commission had not yet rendered its decision.

Such a construction is not one which might lend itself to the objection of retroactively interfering with vested rights. Thus it is settled that, in general, carriers have no vested rights in the use of public highways which are not subject to public regulation. *Stephenson* v. *Binford*, 287 U. S. 251, 264. Also, under the Motor Carrier Act in particular, even an actually issued permit or certificate conveys no such vested right,[9] and it has frequently been recognized that the "grandfather" clause confers merely a special privilege, which

[9] Section 207 (b) of the Motor Carrier Act, 1935 (49 U. S. C. 307 (b)), declares:

> No certificate [for common carriers] issued under this part shall confer any proprietary or property rights in the use of the public highways.

Unquestionably, the same is true of a contract carrier permit.

can be extended only to carriers plainly within its terms. See, *e. g.*, *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83; *McDonald* v. *Thompson*, 305 U. S. 263, 266. See also *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 282. Even more plainly is there an absence of vested rights where, as here, the "grandfather" privileges remain inchoate because they have not yet been "passed upon". *United States* v. *Maher*, 307 U. S. 148, 155. Under the doctrine of the *Maher* case, appellant, in order to be entitled to a "grandfather" permit, was required to continue its operations until the Commission "passed upon" its application, which in appellant's case was subsequent to the Transportation Act of 1940 (see Statement, p. 5, and n. 3, *supra*,). Since the impact upon appellant of the regulatory scheme of the Motor Carrier Act, as amended by the Transportation Act of 1940, was thus contingent in part upon appellant's subsequent acts, no question of retroactivity is presented. *Wickard* v. *Filburn*, No. 59 this Term, decided November 9, 1942, pamphlet pp. 15–16.

B. Even Under Section 210, as it Existed Prior to its Amendment by the Transportation Act of 1940, Dual Operations as Common and Contract Carriers by Separate Corporations Under Common Control Were Prohibited

Section 210, as enacted by the Motor Carrier Act, 1935, and prior to amendment by the Trans-

portation Act of 1940, provided as follows (49 Stat. 543, 554):

> No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in section 202 (a) of this part.

In Section 203 (a) (1) "person" then, as now, was defined to include a corporation (n. 4, *supra*).

As the Commission recognized in the present case (R. 31–32; see also R. 121–125), it had consistently held in decisions under the foregoing language that dual operations by two corporations under common control and management were as much prohibited as those by the same individual or corporation. Thus, in *New York & New Brunswick Auto Express Co., Inc., Common Carrier Application*, 23 M. C. C. 663, 671, the Commission declared:

> Motor Service contends that each applicant is a separate entity and therefore a separate person under the definition shown in section 203 (a) (1) of the act and that the application of each should be determined independently of the other regard-

> less of the terms of section 210. It argues that the corporations, were legitimately formed in good faith, a considerable period before the enactment of the Federal statute regulating motor carriers, each to serve a specific purpose; that there has been no concealment of the common ownership of the two corporations by applicants; that each has complied with our various regulations under the act; and that each is entitled to the authority sought in their respective applications under the applicable "grandfather" clauses of the act. We are unable to agree with applicant's contentions. The Commission and the courts have consistently held that corporate entities may be disregarded by the Commission in circumstances where such action is necessary to permit the proper exercise of statutory regulatory power.
> * * *

This same doctrine had earlier been applied by the Commission in *Universal Service Inc.—Purchase—W. R. Arthur & Co., Inc.*, 15 M. C. C. 247, 250, and had also been recognized in *Kiesle Trucking Co. Inc., Common Carrier Application*, 20 M. C. C. 217.

The Commission's action in disregarding the corporate fiction in the foregoing cases and in the present case was clearly justified. In the *Universal Service* case, *supra*, the Commission further explained the basis for these cases as follows (p. 250):

> We are not convinced that the objectionable features [10] incident to dual operations by a single carrier, which we are authorized to prevent under the provisions of section 210, would be obviated here merely by the expedient of dividing the rights for operation by separate corporate entities.
> * * *

That the policy against discrimination embraced in Section 210 would be thwarted [11] if dual operations as common and contract carriers were permitted by separate corporations under common control and management seems hardly open to question. The Commission, as it clearly recognized (R. 29–30; see also R. 122–123), was in these cases merely applying the familiar rule of

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[10] In its present report the Commission declared (R. 32–33):

> The discrimination which the section is intended to obviate is always present where the same persons are able to offer both kinds of service in respect of the same commodities and between the same points. Applicant's president solicits traffic for the common carrier company and he conceded that its customers approached him with reference to entering into contracts with applicant and that there was competition between the two companies.

The discrimination referred to arises from the fact that ordinarily contract carriers may make a special rate to fit a particular shipper, whereas common carriers cannot (see R. 122).

[11] While in the present case it does not appear that these corporations were organized after the passage of the Motor Carrier Act for the express purpose of violating Section 210, in view of the common ownership and management which exists, dual operations by the two corporations would for the future clearly be contrary to the policy of Section 210.

law that, where common control and management is an actuality, the corporate entity may properly be disregarded to prevent evasion of statutes or the defeating of public convenience. The doctrine was explained by this Court in *New Colonial Ice Co., Inc.* v. *Helvering*, 292 U. S. 435, 442:

> As a general rule a corporation and its stockholders are deemed separate entities * * *. Of course, the rule is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private right. * * *

What is in essence this same basic principle has been applied in numerous other cases.[11]

Where as here, there has been a settled construction of a statute by the administrative authorities entrusted with its application, such construction will not be lightly disturbed by the

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[11] *Griffiths* v. *Commissioner*, 308 U. S. 355; *Gregory* v. *Helvering*, 293 U. S. 465; *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic Association*, 247 U. S. 490; *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330; *United States* v. *Delaware, Lackawanna and Western Railroad Co.*, 238 U. S. 516; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 501; *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8th); *Munson S. S. Line* v. *Commissioner*, 77 F. (2d) 849 (C. C. A. 2d); *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (C. C. E. D. Wis.).

courts. See, *e. g.*, *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Boston & Maine Rd.* v. *Hooker*, 233 U. S. 97. It has been held that this is especially true of constructions by the Commission of the language of the Motor Carrier Act in view of the fact that the Commission proposed it to Congress. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

Appellant, however, in attacking the Commission's construction of the original Section 210, points to the fact that the language of this section was changed in 1940 in order to cover specifically separate corporations under common control (Br. 36–37). It emphasizes the fact that the conference report (H. Rep. No. 2832, 76th Cong. 3d sess.) on the bill which became the Transportation Act of 1940, declared that this new language "amends Section 210 * * * so that the section will apply not only to a particular motor carrier but also to any person controlling, controlled by, or under common control with such person." The legislative history throws little light on the purpose of this change in language. We think, however, that neither the change in the language nor the foregoing statement in the committee report indicates that Congress thought it was making any substantive change in Section 210 as it already had been applied. We believe

that, especially in view of the important part which the Commission took in the drafting of the Transportation Act of 1940 (see S. Rep. No. 433, 76th Cong., 1st sess., pp. 1–2; H. Rep. No. 1217, 76th Cong., 1st sess., pp. 1–2; 84 Cong. Rec. 5871), this amendment was merely intended to ratify and approve the construction which the Commission had already placed upon Section 210. Unquestionably, the mere reenactment by Congress of Section 210 without change after its prior construction by the Commission would have been a persuasive indication of Congressional approval: *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114, 115; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488. Here, it is submitted, Congress simply intended to indicate its approval and ratification of the past construction in more positive form by spelling out and adopting the past administrative construction.

II

THE FINDING OF THE COMMISSION THAT APPELLANT AND ZIFFRIN TRUCK LINES, INC. WERE OWNED, CONTROLLED AND MANAGED IN A COMMON INTEREST IS CORRECT

A. The Question of Control is One of Fact

Where, as here, the application of Section 210 hinges upon a corporate relationship and the existence of common control of corporations, the issue belongs to the administrative routine; its de-

termination has therefore been confided to the Commission. Sections 202 (a) and 204 of the Interstate Commerce Act. See also Section 210. (Appendix, *infra*, pp. 34–35, 38–39). Under well settled principles this determination will not be disturbed if rationally supported.

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, one of the issues was whether the appellant telephone company was subject to the jurisdiction of the Federal Communications Commission by reason of its being *controlled* by the New York Telephone Company. The Communications Commission had so found, and, with respect to its finding, this Court said (pp. 145–146):

> The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. * * *

Although the controlling company owned only one-third of the stock of the Rochester Telephone Company, it was held that actualities may not be disregarded and that control may be manifested in other ways than in terms of percentage of stock interest.

This decision recognized that the question of control is one of fact, and that where its determination is interwoven in the grant of administrative powers the courts will sustain the finding of the administrative body when predicated on a "rational basis" (p. 146). See also *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184–185; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304; *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320.

B. The Finding Was Supported by Substantial Evidence

The evidence clearly shows that both the appellant and Ziffrin Truck Lines, Inc., were outgrowths of the individual operations of Sam Ziffrin. Mr. Ziffrin was in the trucking business prior to 1933 (R. 238–239). The exigencies of his business and the registration requirements of the State of Indiana led to the formation of separate companies (R. 16, 111, 239). But this corporate segregation was not reflected in the internal management of the business (see R. 254). Mr. Ziffrin remained the operator of both concerns (R. 253, 255).

Many of the witnesses called by appellant in proof of the nature and extent of its "grandfather" operations testified that their dealings were with Mr. Ziffrin and that their contracts with Ziffrin, Inc., were negotiated by him. See,

e. g., the testimony of M. F. Chandler, Traffic Manager of Frankfort Distilleries (R. 165, 168), Frank Luther, General Traffic Manager of Distillers Corp.[13] (R. 181, 183, 187, 188), Edward Gusky, General Traffic Manager of Schenley Distillers (R. 204, 215), R. C. Johnson, Treasurer of Beveridge Paper Co. (R. 230), and of B. M. Axtell, General Traffic Manager of Stokeley Bros. & Co. (R. 246).

Mr. Ziffrin's own testimony throws light on the relationship and management of the two companies. Appellant's total capital stock consists of 1,000 shares owned as follows (R. 297, 298):

Sam Ziffrin	495 shares.
Rose Levi	15 shares.
Lewis Berger	100 shares.
S. O. Berman	390 shares.

The directors are Mr. Ziffrin, Rose Levi and S. O. Berman (R. 253). Rose Levi is Mr. Ziffrin's sister (R. 298). Mr. Ziffrin is president and general manager of the company; Mrs. Levi is treasurer; Mr. Levi is an accountant; and Esther Ziffrin, the president's wife, is assistant treasurer (R. 253, 279–280, 297).

Mr. Ziffrin owns 98 per cent of the stock of Ziffrin Truck Lines, Inc.; the remaining stock is owned by his wife and two sons. The stockholders

[13] This witness testified that he dealt with Mr. Ziffrin as representing both the common and contract carrier corporations (R. 188).

comprise the board of directors. (R. 254, 299.) Mr. Ziffrin is president, his wife is treasurer, and his sons are vice presidents (R. 255, 279–280).

Acting for appellant, Mr. Ziffrin handles the business contracts; he testified that he "contacts" the accounts and personally handles 90 per cent of appellant's contracts. (R. 299–300).

The record reveals that both companies have the same offices and terminals in Indianapolis and Chicago (R. 290, 301) and share certain employees (R. 257, 301); the same equipment is frequently used in handling both companies' shipments (R. 322–323); the same driver may handle outbound shipments for appellant and, on the return trip, incoming shipments for Ziffrin Truck Lines, Inc. (R. 323); many of the trucks are registered in the names of both companies, and both names are painted on the trucks (R. 270, 304).

These facts and others appearing of record afford a solid foundation for the finding of common control and operation, and appellant's brief in fact makes no serious contentions to the contrary.

III

THE COMMISSION PROPERLY DETERMINED THAT THE DUAL OPERATIONS OF APPELLANT AND ZIFFRIN TRUCK LINES, INC. WOULD NOT BE CONSISTENT WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY

The Commission found that there were only two points which the record showed appellant has been

serving as a contract carrier which are not involved in the authority granted to Ziffrin Truck Lines, Inc., and even as to these points operations would necessarily be conducted over the routes or within the territory served by the common carrier company. Moreover the two points are actually on routes served by the common carrier, and the latter would not be precluded from interchanging with other common carriers traffic destined to the two points and still retaining substantial portions of the haul. (R. 33, 34–35.) Consequently, it is apparent that the operations of the two companies were conducted "over the same route or within the same territory" (sec. 210). Section 210 therefore became operative to prevent the Commission from granting a permit unless "*for good cause shown*" it should find that the dual operations would be consistent with the public interest and the policy of the Act. [Italics supplied.] See Section 202 (a) of the Motor Carrier Act, 1935, and Section 1 of the Transportation Act of 1940, Appendix, *infra*, pp. 33–34).

Appellant takes the position that having found present the dual operations described in Section 210, it is incumbent on the Commission to grant the application unless it shall affirmatively appear by competent evidence that such operation is inconsistent with the public interest and the national transportation policy (Br. 50). Obviously, such

a position is untenable. The prohibition attaches by operation of the statute and persists until the Commission finds on competent evidence that the dual operation is consistent with the public interest and the national transportation policy. When such evidence is absent, the Commission must, under the statute, deny the application. The burden thus rests with the applicant. Here appellant failed to adduce any evidence to show that the dual operation would not offend against the public interest and national transportation policy. On the contrary, the evidence particularly demonstrated some of the vices inherent in the relationship of appellant to Ziffrin Truck Lines, Inc. (R. 188–190, 257, 301, 322, 323).

The underlying reasons for the enactment of Section 210 are obvious. It was designed to prevent unfair competition between the two classes of motor carriers through solicitation of business and the opportunity to offer both kinds of service for the same commodities between the same points. *Transport Co.—Control-Arrow Carrier Corp.*, 36 M. C. C. 61, 80; *New York & New Brunswick Auto Express Co., Inc., Common Carrier Application*, 23 M. C. C. 663, 676; *C. Louis Lavine, Inc., Contract Carrier Application*, 14 M. C. C. 555, 557; *Milstead Contract Carrier Application*, 11 M. C. C. 157, 162; *Oilfields Trucking Co.—Purchase—Dunbar*, 5 M. C. C. 137, 139. The Commission is

charged with the duty of administering the Act so as to preserve the inherent advantages of all modes of transportation, to promote "efficient service and foster sound economic conditions * * *" and "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations * * * or unfair or destructive competitive practices * * *" (Section 1 of the Transportation Act of 1940; see also Section 202 (a) of the Motor Carrier Act, 1935, Appendix, *infra*, pp. 33–34). The Commission was bound to follow this legislative mandate, and it found that the dual operation which it had under scrutiny could not be authorized consistently with the public interest and the policy of the Act (R. 33–34). This was an administrative determination which rested peculiarly within the province of the Commission. The record supports (R. 16, 22, 27–29, 33; see also pp. 26–28, *supra*) the finding in the Commission's report which denies the continuance of this dual operation. This finding must therefore be sustained. *Gray* v. *Powell*, 314 U. S. 402, 412, 413; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *United States* v. *Maher*, 307 U. S. 148, 154; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

CHARLES FAHY,
Solicitor General.

THURMAN ARNOLD,
Assistant Attorney General.

ROBERT L. PIERCE,
EDWARD DUMBAULD,
Special Assistants to the Attorney General.

WALTER J. CUMMINGS, Jr.,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel.

DANIEL H. KUNKEL,
Principal Attorney,
Interstate Commerce Commision.

DECEMBER 1942.

APPENDIX

Section 202 (a) (the declaration of policy) of the Motor Carrier Act, 1935 (49 Stat. 543) provides:

> It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers, in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Section 1 (the declaration of policy) of the Transportation Act of 1940 (54 Stat. 898) provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation

of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 202 (a) (49 U. S. C. 302 (a)) of the Interstate Commerce Act, Part II, provides:

The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provisions of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

Section 204 (49 U. S. C. 304) provides in part:

It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

Section 204, as amended (49 U. S. C. 304) by the Transportation Act of 1940, provides in part:

It shall be the duty of the Commission—

* * * * *

(7) For purposes of the administration of the provisions of this part, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

Section 209 (49 U. S. C. 309) provides:

(a) Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier

by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing

provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that

the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

Section 210 (49 Stat. 554), as originally enacted in the Motor Carrier Act, 1935, provided:

No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in section 202 (a) of this part.

Section 210, as amended (49 U. S. C. 310) by Section 21 (a) of the Transportation Act of 1940 provides:

> Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—
>
> (1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and
>
> (2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO. 245

ZIFFRIN, INCORPORATED,
Appellant,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Appellees.

APPELLANT'S PETITION FOR REHEARING

IRA HOWELL ELLIS,
JOHN S. POWELL,
520 Illinois Building,
Indianapolis, Indiana,
Counsel for Ziffrin, Incorporated, Appellant.

February 25, 1943.

Central Publishing Company, Indianapolis, Ind.

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TO THE SUPREME COURT OF THE UNITED STATES:

Comes now Ziffrin, Incorporated, Appellant in the above entitled cause, and files this, its petition for rehearing of the above entitled cause, and in support of said petition, respectfully represents and shows to the court, that:

1. On February 1, 1943, this court affirmed the judgment of the United States District Court for the Southern District of Indiana in the above entitled cause, which judgment dismissed for want of equity a petition for an

interlocutory and final injunction to set aside and annul an order of the Interstate Commerce Commission in its cause No. MC 2511, entitled Ziffrin, Inc., Contract Carrier Application, decided May 29, 1941.

The opinion of this court, delivered by Mr. Justice Reed, considers at some length another order of the Interstate Commerce Commission entitled Ziffrin, Inc., Contract Carrier Application, reported at 33 M. C. C. 155. The opinion states that the above order of the Interstate Commerce Commission was called to the attention of the court by the government in brief and argument and that under those circumstances this court will not disregard it.

The opinion of the court does not refer to the position of appellant relative to the order reported at 33 M. C. C. 155. The appellant made no reference to this order in its first brief to this court because appellant considered it improper to discuss matters which appellant believes to be outside of the record. When this order was interjected into the case before the court in appellees' brief, appellant did refer to said order in its reply brief at pages 10 and 11, where, commenting upon the use made of this order by appellees, appellant said:

> "We respectfully submit that no consideration whatsoever should be given by this court to matters discussed by appellees which are outside the record."

At the time of oral argument before this court, counsel for appellees referred to said order briefly, and admitted that said order and the circumstances connected with it are not a part of the record before this court. Counsel for appellant was interrogated concerning said order at some length by members of the court, and attempted to reply insofar as time permitted.

In the brief time allotted for argument of cases on the summary docket, counsel for appellant did not have an opportunity to develop fully the circumstances surrounding the negotiations which resulted in the order of the Interstate Commerce Commission reported at 33 M. C. C. 155.

2. The record before this court shows that the answers of appellees, United States of America and Interstate Commerce Commission, filed in the court below, prior to the negotiations which resulted in the order reported at 33 M. C. C. 155, admit that Ziffrin, Inc., had exhausted all its remedies before the Interstate Commerce Commission before filing its petition for injunction in the District Court of the United States for the Southern District of Indiana.

On January 17, 1942, after the taking of evidence in the court below in this cause, being No. 448 in the United States District Court for the Southern District of Indiana, Indianapolis Division, and during the argument of counsel which followed the taking of evidence in the court below, the court called a recess and invited counsel for all parties to consult with the court in chambers. At this conference, members of the court made inquiry of counsel as to whether or not some plan could be worked out to meet the objections of the Interstate Commerce Commission as set out in its order of May 29, 1941. Counsel for Ziffrin, Inc., indicated that plaintiff would welcome such an opportunity to reopen the case before the Interstate Commerce Commission, providing the Interstate Commerce Commission would agree to reconsider the evidence in the record as to the scope of the territory and commodities claimed by Ziffrin, Inc., in its application and would set the cause down for further hearing as to the relationship between Ziffrin, Inc., the contract carrier, and Ziffrin Truck Lines, Inc., the common carrier, and

that if the cause was set down for further hearing on the question of dual operations that Ziffrin, Inc., would introduce evidence showing a complete divestment of any common control by relationship or otherwise between the two carriers.

There followed a discussion of the matter by various persons present at the conference and no one voiced any objections to the proposal. Counsel for Ziffrin, Incorporated, stated that a petition would be filed with the Interstate Commerce Commission in line with the suggestion of the court.

3. As far as appellant is advised, there was no record kept of the conference at which the agreement to attempt to settle the litigation was reached. Among the persons present at said conference, however, were Russell J. Dean, attorney-at-law, Indianapolis, Indiana, counsel for Emmett J. Williams, et al., members of the International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers, intervenors in the cause before said district court, and Milledge Galphin, Jr., attorney-at-law, Louisville, Kentucky, counsel for Joseph E. Seagram & Sons, Inc., and Calvert Distillery Company, intervenors in said cause before the district court.

Attached to this petition as Appendix "A" and made a part hereof by reference is the affidavit of said Russell J. Dean relative to what occurred at said conference, and attached to this petition as Appendix "B" and made a part hereof by reference is the affidavit of said Milledge Galphin, Jr., relative to what occurred at said conference. The statements included in these affidavits speak for themselves and appellant respectfully requests the court to consider said affidavits in connection with this petition.

4. Following said conference the court, in open court, fixed the brief date in Cause No. 448 in the United States District Court for the Southern District of Indiana, Indianapolis Division, Ziffrin, Incorporated, plaintiff, v. United States of America and Interstate Commerce Commission, defendants, without regard to or consideration of said agreement to attempt to compromise the case, and the plaintiff, Ziffrin, Incorporated, did on January 27, 1942, file its printed brief in 113 pages with said district court, and said brief was devoted to a discussion of the law and the evidence before said court in said case.

In said brief, the plaintiff, Ziffrin, Incorporated (appellant here), made no reference to said agreement to attempt to compromise and settle the litigation, and it is obvious that the plaintiff could not have discussed the order of the defendant Interstate Commerce Commission now reported in 33 M. C. C. 155, for said order of said Interstate Commerce Commission shows on its face that it was not entered until April 6, 1942.

5. Counsel for appellant, Ziffrin, Incorporated, did prepare and file with the Interstate Commerce Commission a petition to reopen the cause before the Commission, and attached to said petition was a tentative plan for eliminating the common control of Ziffrin, Inc., and Ziffrin Truck Lines, Inc., which control was the basis of the denial order of the Interstate Commerce Commission dated May 29, 1941.

Following the filing of said petition, the appellee, Interstate Commerce Commission, on April 6, 1942, entered its order denying said petition for reopening and reconsideration of the proceedings, and in said order attempted to pass upon the tentative plan of divestment of common control of appellant, Ziffrin, Incorporated, and Ziffrin Truck

Lines, Inc., submitted with said petition without the hearing of any evidence whatsoever concerning said tentative plan. The order of the appellee, Interstate Commerce Commission, refusing to reopen the case was contrary to appellant's understanding of the agreement arrived at at the conference held at the request of the judges sitting in the United States District Court for the Southern District of Indiana, heretofore referred to in this petition.

6. Appellant recognizes the fact that this court may take judicial knowledge of printed reports of the orders of the Interstate Commerce Commission.

Since this court has considered the order of the appellee Interstate Commerce Commission dated April 6, 1942, and reported at 33 M. C. C. 155 in connection with its decision that rejected appellant's contention it has not been given an opportunity to show compliance with amended Section 210 of Part II of the Interstate Commerce Act, we believe that the court should give consideration to the fact that said order of the appellee Interstate Commerce Commission, while made without any hearing or without any evidence, erroneously states matters which were in evidence before the appellee Interstate Commerce Commission and which are in evidence before this court, and further we believe that the court should give consideration to the fact that the appellee Interstate Commerce Commission makes said erroneous statements concerning said evidence the basis for its rejection, without hearing, of the tentative plan submitted by appellant in the petition filed by appellant with the appellee Commission at the request of the judges sitting in the district court.

In said order of April 6, 1942, in attempting to recite the stock ownership of appellant on October 27, 1937, when

oral argument was held before the appellee Commission, the order states:

> "A brother-in-law of Ziffrin who at one time owned 39% of applicant's stock had died at the time of the oral argument, but his estate still owned 14.5% of the outstanding stock. Thus, Ziffrin and his relatives at that time owned or controlled 65.5% of all of applicant's stock."

The stockholder "who at one time owned 39% of applicant's stock" was S. O. Berman of Logansport, Indiana, and exactly who Mr. Berman was prior to his death was in evidence before the appellee Commission and is in the record before this court. (R. 298, Ex. 3, R. 85.) Mr. Berman was not the brother-in-law of Mr. Sam Ziffrin, as erroneously stated by the appellee Commission in its order of April 6, ... 2, and furthermore, Mr. Berman was not related to Mr. Ziffrin in any manner whatsoever. The death of Mr. Berman occurred following the hearing before the appellee Commission, but prior to oral argument before the appellee.

At the time of the oral argument before appellee, appellant called this situation to the attention of appellee, and further called to the attention of appellee the fact that Mr. Frank McHale of Indianapolis, Indiana, had acquired a part of the stock formerly owned by Mr. Berman, and that a part of the stock formerly owned by Mr. Berman was still held by the estate of Mr. Berman.

In the order of April 6, 1942, in rejecting the tentative plan submitted, it is clear that the appellee Commission arrives at the conclusion that Mr. Ziffrin would remain in control of appellant by combining his stock ownership with that of his alleged but not actual brother-in-law, Mr. Sam Berman. In that connection the order of April 6, 1942, states:

"There is also no explanation as to the present ownership of the 14.5% of the stock which at that time was held by the estate of Ziffrin's brother-in-law."

Here again the appellee erroneously referred to the estate of Mr. Berman as being the "estate of Ziffrin's brother-in-law" when in fact, as heretofore pointed out, Mr. Berman was not Mr. Ziffrin's brother-in-law and was not related to him. The portion of the stock of Mr. Berman not transferred to Mr. McHale is still owned by the estate of Mr. Berman.

Appellant calls to the attention of the court that in addition to erroneously stating that Mr. Berman was Mr. Ziffrin's brother-in-law in the order of April 6, 1942, the appellee Commission in the order complained of in this cause, the order of May 29, 1941, erroneously stated the stock ownership of appellant by omitting Mr. Berman as a stockholder altogether and stating that Mr. Berman's stock was owned by L. Berger of Averne, New York, in addition to the stock which Mr. Berger actually owned.

The stock ownership of the appellant and the relationship between stockholders, when any such relationship existed, both before and after the death of Mr. Berman, was available to the appellee Commission in the record before it, and is in the record before this court. The stock ownership which would have existed for appellant had the tentative plan attached to the petition to reopen, filed at the suggestion of the district court, been approved, was fully and completely set out in said petition. In spite of the fact that the stock ownership of appellant and the relationship between stockholders, when any such relationship existed, has been at all times clearly before the appellee, nevertheless, the appellee Commission has never, either in the order complained of dated May 29, 1941, or

in the order of April 6, 1942, correctly stated the stock ownership of appellant or the proposed stock ownership of appellant or the relationship existing between appellant's stockholders, when such relationships existed, although in both of said orders, and particularly in the order of April 6, 1942, the appellee Commission has based its findings upon erroneous statements of the facts relating to appellant's stock ownership.

Appellant respectfully submits that if the order of April 6, 1942, is before this court and can be used to defeat appellant's contention that it has been denied its day in court before the appellee Commission to show compliance with amended Section 210, then the order of April 6, 1942, should be before this court for all purposes, including an inquiry as to the misstatement of the facts relative to appellant's stockholders, as disclosed by the record before this court.

The opinion of this court, after quoting a portion of the order of April 6, 1942, states:

> "The Commission then restated the evidence showing common control of the two corporations, and concluded that the plan proposed would not change the situation." (Opinion of this court dated February 1, 1943, page 5.)

We respectfully submit that since the court has included in its opinion the statement just quoted, this court should reconsider its decision in view of the fact, as set out in this petition, that the appellee had erroneously stated the evidence before it, and before this court, and that the appellee based its conclusions, in part at least, upon said erroneous statement of evidence before this court.

Attached to this petition as Appendix "C" is the affi-

davit of Ira Howell Ellis, one of the attorneys for appellant, stating that this petition is presented in good faith and not for delay. This affidavit is made to show appellant's compliance with Rule No. 33 of this court.

WHEREFORE, appellant, Ziffrin, Incorporated, prays the Supreme Court of the United States to grant rehearing in Cause No. 245, October Term, 1942, entitled Ziffrin, Incorporated, appellant, v. Interstate Commerce Commission and United States of America, and for all other relief necessary and proper in the premises.

ZIFFRIN, INCORPORATED,
Appellant,

By: IRA HOWELL ELLIS,
JOHN S. POWELL,
520 Illinois Building,
Indianapolis, Indiana,
Its Attorneys.

APPENDIX "A"

Affidavit of Russell J. Dean

STATE OF INDIANA
COUNTY OF MARION ss:

Russell J. Dean, being first duly sworn, deposes and says:

1. That he is now and he was at all times covered by circumstances mentioned in this affidavit, an attorney at law engaged in the active practice of his profession at Indianapolis, Indiana, with offices at 520 Peoples Bank Building in said city of Indianapolis;

2. That he appeared as counsel for Emmett J. Williams, et al., intervenors in the case of Ziffrin, Incorporated v. United States of America and Interstate Commerce Commission, No. 448, in the United States District Court for the Southern District of Indiana, Indianapolis Division, and that said Emmett J. Williams was Secretary-Treasurer of Local No. 25 of the International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers, and State Representative for Indiana of said International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers, and that the other intervenors represented by him were members of said International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers;

3. That as counsel for said intervenors he appeared and was present at the final hearing of said cause in said United States District Court for the Southern District of Indiana, Indianapolis Division, on January 17, 1942, when said cause was heard by a statutory three-judge court composed of the Honorable Sherman Minton, Cir-

cuit Judge, the Honorable John P. Barnes, and the Honorable Robert C. Baltzell, District Judges;

4. That following the taking of evidence in said case before said court, oral argument was presented to said court by counsel for the parties, and that during said oral argument said court called a recess and summoned counsel for the parties into the chambers of the Honorable Robert C. Baltzell, District Judge;

5. That included among the persons present in the chambers of said court pursuant to the request of said court were:

The Honorable Sherman Minton, Circuit Judge,

The Honorable John P. Barnes and the Honorable Robert C. Baltzell, District Judges,

Daniel H. Kunkel, Attorney for the defendant Interstate Commerce Commission,

Smith R. Brittingham, Jr., Special Assistant to the Attorney General of the United States, representing the defendant United States of America,

John S. Powell and Howell Ellis, representing the plaintiff, Ziffrin, Incorporated,

Milledge Galphin, Jr., representing the intervenors, Joseph E. Seagram & Sons, Inc., and Calvert Distillery Company,

Brainerd W. LaTourette, representing the intervenor, Common Carrier Division of the American Trucking Associations, Inc.,

A. Shelby Winstead, representing the intervenor, Louisville Provision Company,

Lew A. Robertson, counsel for the intervenor, The Beveridge Paper Company, and

your affiant;

6. That members of said court in said conference, entirely off of the record and independent of the proceedings being heard in open court, requested the parties to attempt to settle and compromise said lawsuit, and that after some discussion of the suggestions and requests of said court it was agreed by and between all parties present that attorneys for said Ziffrin, Incorporated would file a petition with the Interstate Commerce Commission requesting said Commission to reopen Cause No. MC-2511, entitled Ziffrin, Incorporated, Contract Carrier Application before said Commission, for the purpose of taking further evidence, and particularly for the purpose of taking further evidence relative to the status of said Ziffrin, Incorporated, in view of the provisions of Section 210 of the Interstate Commerce Act, effective September 18, 1940, and as to what steps had been taken or would be taken by said Ziffrin, Inc., fully to comply with the provisions of said section, and also particularly to review the scope of operating rights to which Ziffrin, Inc., is entitled;

7. That said Kunkel and said Brittingham, representing the defendants in said case pending before said United States District Court for the Southern District of Indiana, Indianapolis Division, agreed as representing their respective clients, that said case would be reopened by said Interstate Commerce Commission for the purpose of taking further evidence as aforesaid;

8. That said court indicated that decision of said case by said court would be withheld temporarily pending the result of said proceedings before the Interstate Commerce Commission, but said court, in open court, following said conference fixed the date for filing briefs in said suit without regard to any further proceedings before said Interstate Commerce Commission;

9. That your affiant was present during said conference and participated in said agreement, and that your affiant has set out fully and completely what occurred at said conference to the best of his knowledge and belief.

Further affiant sayeth not.

RUSSELL J. DEAN.

Subscribed and sworn to before me, a notary public in and for said county and state, this 16th day of February, 1943.

LUCILLE LARIMORE, Notary Public.

My commission expires May 1, 1943.

APPENDIX "B"

Affidavit of Milledge Galphin, Jr.

Milledge Galphin, Jr., being first duly sworn, deposes and says that:

1. He is now and he was at all times covered by circumstances mentioned in this affidavit, an attorney at law engaged in the active practice of his profession at Louisville, Kentucky, with offices at 613 Marion E. Taylor Building, in said city of Louisville.

2. He appeared as counsel for Joseph E. Seagram & Sons, Inc., and Calvert Distillery Company, intervenors in the case of Ziffrin, Incorporated v. United States of America and Interstate Commerce Commission, No. 448 in the United States District Court for the Southern District of Indiana, Indianapolis Division.

3. As counsel for said intervenors he appeared and was present at the final hearing of said cause in said United States District Court for the Southern District of Indiana, Indianapolis Division, on January 17, 1942, when said cause was heard by a statutory three-judge court composed of the Honorable Sherman Minton, Circuit Judge, the Honorable John P. Barnes, and the Honorable Robert C. Baltzell, District Judges.

4. Following the taking of evidence in said case before said court, oral argument was presented to said court by counsel for the parties, and during said oral argument said court called a recess and summoned counsel for the parties into the chambers of the Honorable Robert C. Baltzell, District Judge.

5. Included among the persons present in the cham-

bers of said court pursuant to the request of said court were:

The Honorable Sherman Minton, Circuit Judge,

The Honorable John P. Barnes and the Honorable Robert C. Baltzell, District Judges,

Daniel H. Kunkel, Attorney for the defendant Interstate Commerce Commission,

Smith R. Brittingham, Jr., Special Assistant to the Attorney General of the United States, representing the defendant United States of America,

John S. Powell and Howell Ellis, representing the plaintiff, Ziffrin, Incorporated,

Russell J. Dean, representing certain intervenors, members of the International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers,

Brainerd W. LaTourette, representing the intervenor Common Carrier Division of the American Trucking Associations, Inc.,

A. Shelby Winstead, representing the intevenor, Louisville Provision Company,

Lew A. Robertson, counsel for the intervenor, The Beveridge Paper Company, and

your affiant.

6. Members of said court in said conference did not indicate to the parties what their views were as to the merits of the plaintiff's case, but did infer that the case did raise some serious questions and the court in said conference stated in substance through the presiding Judge that it would be better if some plan, settlement or compromise could be devised by which the assets and business of the plaintiff, Ziffrin, Incorporated, could be saved as a going concern and it continue to operate, as against a possible adverse decision, and the court did

thereupon request the parties to attempt to see if such a plan could be worked out with that end in view.

7. No objection was made by anyone at this conference in chambers to the said suggestion of the court, and the parties present indicated that the request of the court might be successfully carried out, and that they would work toward that end.

8. Thereupon the attorneys for the plaintiff, said Ziffrin, Incorporated, stated that they would file in behalf of said Ziffrin, Incorporated, a petition with the Interstate Commerce Commission requesting said Commission to reopen Cause No. MC-2511, entitled "Ziffrin, Incorporated, Contract Carrier Application" before said Commission to consider a plan which would be presented to meet the objections raised by the defendants and for the purpose of showing what steps had been taken, or would be taken by said Ziffrin, Incorporated, fully to comply with the provisions of Section 210 of the Interstate Commerce Act, effective September 18, 1940, and to hold a hearing upon said petition, and to determine upon a hearing the operating rights to which Ziffrin, Incorporated, was entitled.

9. No objection was made by the attorneys for the defendants to this proposal, and it was the understanding of this affiant from what was said between the attorneys for the defendants and the attorneys for the plaintiff, and by members of the court that it was agreed that the plaintiff and the defendants would attempt to settle the pending law suit and would proceed in the manner above stated.

10. The discussion in chambers aforesaid, and the request of the court and the agreement of the parties were entirely off the record and independent of the proceedings being heard in open court. No written record was

made at the time, in so far as known to this affiant, of what transpired in the aforesaid conference in chambers. It was the understanding of this affiant that the decision of the District Court in the pending case would be held in abeyance until the petition aforementioned could be filed and a hearing held thereon before the Interstate Commerce Commission.

11. This affiant is informed that thereafter the attorneys for the plaintiff, Ziffrin, Incorporated, did file with the Interstate Commerce Commission in the action aforementioned, its petition to reopen said action for further consideration, and did file with said petition the plan aforementioned, and that the order of the Commission with reference to said petition shows that it was filed pursuant to the suggestion or understanding had at the conference aforesaid, but this affiant is also informed by one of the attorneys for plaintiff that said petition was denied or overruled without said Commission affording the plaintiff an opportunity to be heard thereon.

12. This affiant was present during all of said conference and has set out fully what occurred at said conference to the best of his knowledge and belief.

Further affiant sayeth not.

MILLEDGE GAITHER, JR.

STATE OF KENTUCKY
COUNTY OF JEFFERSON ss:

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid, this 13th day of February, 1943.

L. M. DUSELKAMP, Notary Public,
Jefferson County, Kentucky.

My commission expires November 7, 1946.

APPENDIX "C"

Affidavit of Ira Howell Ellis

STATE OF INDIANA
COUNTY OF MARION ss:

Ira Howell Ellis, being first duly sworn, deposes and says:

1. That he is an attorney-at-law, engaged in the active practice of his profession at Indianapolis, Indiana, with offices at 520 Illinois Building in said city of Indianapolis, and that he is one of the attorneys for the appellant, Ziffrin, Incorporated, before the Supreme Court of the United States in Cause No. 245, October Term, 1942, entitled Ziffrin, Incorporated, appellant, v. United States of America and Interstate Commerce Commission, appellees;

2. That as counsel for said Ziffrin, Incorporated, he has assisted in the preparation of the petition for rehearing in said Cause No. 245, October Term, 1942, Ziffrin, Incorporated v. United States of America and Interstate Commerce Commission, to which this affidavit is attached, and that he has read said petition and is familiar with the contents thereof;

3. That said petition for rehearing of said Ziffrin, Incorporated, filed in Cause No. 245, October Term, 1942, Ziffrin, Incorporated v. United States of America and Interstate Commerce Commission, is presented in good faith and not for delay.

Further affiant sayeth not.

IRA HOWELL ELLIS.

Subscribed and sworn to before me, a notary public in and for said county and state, this 18th day of February, 1943.

LUCILLE LARIMORE, Notary Public.

My commission expires May 1, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 245.—October Term, 1942.

Ziffrin, Incorporated, Appellant, *vs.* The United States of America and Interstate Commerce Commission.	On Appeal from the District Court of the United States for the Southern District of Indiana.

[February 1, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal brings here for review a judgment of a statutory three judge court denying a petition for an interlocutory and a final injunction setting aside and annulling an order of the Interstate Commerce Commission.[1] The order attacked denied an application of appellant, an Indiana corporation, filed February 4, 1936, for a permit to continue designated contract carrier operations under the grandfather clause of Section 209(a) of the Interstate Commerce Act.

The denial of the application by the Commission on May 29, 1941, 28 M. C. C. 683, was on the ground that applicant and Ziffrin Truck Lines, Inc., a certificated common carrier by motor vehicle, were owned, controlled and managed in a common interest and that under Section 210 of the Interstate Commerce Act, Part II, it would not be consistent with the public interest and the national transportation policy to grant the application.

Section 210 of the Motor Carrier Act was amended between the filing of the application and the entry of the order denying it. The two forms of Section 210 appear in the note below.[2]

It is appellant's contention that whatever may have been the effect of the earlier form, with the passage of the amendment after

[1] Urgent Deficiencies Act, 38 Stat. 208, 220, 28 U. S. C. §§ 47, 47(a); Judicial Code § 238, 43 Stat. 936, 938, 28 U. S. C. § 345; § 205(h) Interstate Commerce Act, Part II, 49 Stat. 543, 550, 49 U. S. C. § 305(h).

[2] Section 210 (49 Stat. 554), as originally enacted in the Motor Carrier Act, 1935, provided:

"No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held con-

the hearing the applicant should now have an opportunity to show the absence of common control of it and Ziffrin Truck Lines, Incorporated. As Section 210 stood when appellant requested its permit and at the hearing, a certificate as a common carrier and a permit as a contract carrier were not to be held by the same person without special finding of consistency with the public interest by the Commission. The amendment provided that without a similar special finding no person should hold a contract carrier permit who was under common control with a person holding a common carrier certificate. Person, of course, included a corporation. 49 U. S. C. 303(a)(1).

Obviously the fear of possible evasion led to the change in language. Indeed, the Commission had disregarded the corporate fiction and interpreted the earlier form as covering persons under common control.[3] This was called to applicant's attention by an order of June 23, 1938, setting the date for hearing the application.[4] The interpretation was discussed in the examiner's report, in the Commission's report, and applied, adversely to appellant, by the findings. 28 M. C. C. 683, 692-99.

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sistently with the public interest and with the policy declared in section 202(a) of this part."

Section 210, as amended (49 U. S. C. 310) by Section 21(a) of the Transportation Act of 1940 provides:

"Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—

"(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

"(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

[3] In re New York & New Brunswick Auto Exp. Co., Inc., Common Carrier Application, 23 M. C. C. 663, 671. Cf. In re Bigley Brothers, Inc., Contract Carrier Application, 4 M. C. C. 711; Universal Service, Inc.,—Purchase—W. B. Arthur & Co., Inc., 15 M. C. C. 247.

[4] The order read in part as follows:

"Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC 2510) and if said applicant and the Ziffrin Truck

When the Transportation Act of 1940 was before the Senate, the draftsmen added a sentence to the earlier form of Section 210, reading as follows: "This section shall apply to dual operations by affiliated carriers." When the bill, S. 2009, in the two forms in which it was enacted in the Senate and the House of Representatives, was examined by the Interstate Commerce Commission, the Chairman of its legislative committee transmitted a report on the provisions of the bill to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the House Committee on Interstate and Foreign Commerce.[5] In the report (at page 62) this comment was made as to the present Section 210:

"Desirable.—(a) After the new section 22 which we have proposed above, add a new section 23 (with appropriate renumbering of subsequent sections) reading as follows:

'SEC. 23. Section 210 of the Interstate Commerce Act, as amended, is amended by adding at the end thereof the following new sentence: "This section shall apply to dual operations by affiliated carriers."'

This sentence has been introduced at the end of section 45 of the Senate bill, and it has our approval. The Commission has construed section 210 of part II to have such an application, but it is desirable to remove all doubt on the point."

At the conference of the committee for the two Houses of Congress, the form of Section 210 was changed to the present reading. The report contains this explanation:[6]

"Section 21(a). Dual Operations Under Certificates and Permits, Motor Carriers.

"The conference substitute in section 21(a) amends section 210 of the Interstate Commerce Act which prohibits a person from holding at the same time both a certificate as a common carrier of property by motor vehicle and a permit as a contract carrier of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that both forms of operating authority may be held consistent with the public interest and with the policy declared in part II, so that the section will apply not only to a particular motor carrier but also to any person controlling, controlled by, or under common control with, such person."

Lines, Inc., are found to be affiliated within the meaning of Section 5(6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Section 202(a) of the Motor Carrier Act, 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act, 1935."

[5] Omnibus Transportation Legislation, House Committee Print, 76th Cong., 2d Sess.

[6] H. Rep. No. 2832, 76th Cong., 3d Sess., p. 78.

It is unnecessary, however, to decide whether the Commission correctly applied Section 210 as originally enacted to such common control as the Commission found in appellant and Ziffrin Truck Lines, Inc. We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered. The permit was effective for the future and the amendment forbade persons under common control holding both a permit and a certificate. Previously appellant had been operating under an ex parte permit. Protests to the grant had been made on account of the dual operation, the formal hearing was held and the question raised by these protests was heard at length. A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, and cases cited. Cf. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464. *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation.

We find no basis for appellant's contention that he was given improper notice of the hearing and denied an opportunity to show compliance with the amended section. The steps of notice and hearing detailed above demonstrate the error of the former contention. As to the latter, it is met completely by the report and order of the Commission, made while this suit was pending in the District Court, and denying appellant's motion for reconsideration of the order of May 29, 1941. *Ziffrin, Incorporated, Contract Carrier Application*, 33 M. C. C. 155. This opinion was called to our attention by the Government in brief and argument. In the circumstances, we will not disregard it. The Commission there said, p. 156:

"At the conclusion of the trial on applicant's suit before the three-judge court, a conference was held between the counsel for all the parties to the suit in the court's chambers. It was there suggested by the court that applicant submit to this Commission some method for divorcing applicant herein from Ziffrin Truck Lines, Inc., which might eliminate the conflict with section 210 of the act on which the denial of the application was grounded. Pursuant to this suggestion, applicant has filed a petition seeking reopening and reconsideration of the proceeding, and, as a basis therefor, proposes a plan for elimination of the common control of applicant and Ziffrin Truck Lines, Inc. The petition is opposed

by an association of motor common carriers. It is understood that the filing of this petition and action by us thereon does not terminate the court proceeding. Pending our action on the petition, however, the entry of judgment by the court is being held in abeyance. In view of the pendency of the litigation, we believe that a statement of the reasons for our action with respect to this petition will be helpful."

The Commission then restated the evidence showing common control of the two corporations and concluded that the plan proposed would not change the situation. See 33 M. C. C. 155; 28 M. C. C. 683, 692, *et seq.* The evidence is ample to support the conclusion of the Commission entered at the earlier hearing. This is sufficient to support the order upon judicial review. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 185; *United States* v. *Maher*, 307 U. S. 148, 155.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.